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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TWIN CITY SPORTSERVICE, INC., *et al.*,
Petitioner,

vs.

CHARLES O. FINLEY & COMPANY, INC., *et al.*,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Under the Rule of Reason, may a long-term exclusive contract be found to violate Section 1 of the Sherman Act without examination of the actual competitive impact of the challenged terms?

2. May an attempt to monopolize be found where there is no evidence of either a specific intent to monopolize or a dangerous probability of success, but both are merely presumed by the court from conduct that is not *prima facie* anticompetitive?

3. May damages arising from a contract alleged to restrain trade be awarded automatically without any showing of an antitrust injury or even injury in fact?

PARTIES INVOLVED

The parties to the proceeding in the court below are Twin City Sportservice, Inc. and Sportservice Corporation as Appellants and Charles O. Finley & Company; Charles O. Finley; Shirley M. Finley; Charles O. Finley, Jr.; Paul M. Finley; Sharon Kessling and Kathryn Perlmutter as Appellees.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Twin City Sportservice, Inc., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on May 10, 1982.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, reported at 676 F.2d 1291, is reproduced in Appendix A, *infra*, pp. 1a-42a. The District Court's Memorandum and Order dated December 29, 1978 is unreported and is reproduced in Appendix B, *infra*, pp. 43a-59a. The District Court's Memorandum and Order dated March 31, 1977 is unreported and is reproduced in Appendix C, *infra*, pp. 60a-76a. The Ninth Circuit opinion dated February 21, 1975 is reported at 512 F.2d 1264 and reproduced in Appendix D, *infra*, pp. 77a-93a. The District Court's opinion dated October 17, 1972 is reported at 365 F. Supp. 235 and is reproduced in Appendix E, *infra*, pp. 94a-128a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1982. On July 19, 1982, Mr. Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including September 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15. These statutory provisions are set forth in Appendices F, G, and H respectively, *infra*, pp. 129a-131a.

STATEMENT

This case began in 1967. Fifteen years later, it has now been the subject of two district court trials and two appeals before the Ninth Circuit. The net effect to date is that the owners of the Oakland (*nee* Philadelphia and later Kansas City) Athletics baseball club have been able to sell their concession rights twice and collect treble damages to boot.

The antitrust claims have been based on asserted foreclosure of competition in the market for the purchase of concession franchises, i.e., the market in which concessionaires purchase the right to operate concessions at facilities or events. 676 F.2d at 1304; App. A at 18a. The basic facts which made up this "restraint of trade" are simple. In 1950, the owners of the Athletics sold the team's concession rights to the petitioner, Twin City Sportservice ("Sportservice"), for 15 years in exchange for cash, credit and an agreement to pay 29 percent of the gross receipts from concession items sold by Sportservice. 512 F.2d at 1268-69; App. D at 78a. In 1952 and again in 1954, the team's owners amended the contract to extend its term (first to 1975 and then to 1983) and to add a follow-the-

franchise clause[1] in return for loans and other valuable consideration from Sportservice. 512 F.2d at 1269; App. D at 79a. There has never been any contention that the consideration for the franchise and extensions was inadequate.[2]

When Charles O. Finley & Co. ("Finley") bought the Athletics in 1961, Finley's purchase was necessarily subject to the then outstanding Sportservice contract, and the Athletics' purchase price presumably reflected this prior sale of concession rights. In 1967 Finley moved the team to Oakland, California, unilaterally broke its contract with Sportservice, and entered into a new contract with the concessionaire who was then operating at the Oakland Stadium. 512 F.2d at 1269; App. D at 79a. Sportservice sued for breach of contract; Finley counterclaimed alleging the contract violated the Sherman Act. Finley's contention was, in effect, that the outstanding contract with Sportservice operated as a restraint of trade because it prevented Finley from making a new contract with Sportservice or some other concessionaire.

In 1970, the district court upheld Sportservice's contract claims, but withheld judgment pending resolution of Finley's antitrust claims. 365 F. Supp. at 238; App. E at 96a. In 1972, Finley's antitrust claims were upheld, but in 1975 that decision was unanimously reversed and remanded by the court of appeals. 512 F.2d 1264; App. D at 77a. In 1978, the district court upheld Finley's antitrust claims again.[3] Finally, on May

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[1] The follow-the-franchise clause provided that, should the Athletics move to another city (as they had done once before, moving to Kansas City from Philadelphia in 1954), the concession franchise would nonetheless remain in effect.

[2] On the contrary, the essence of the violation alleged by the Athletics against Sportservice is that the latter paid too much for its concession contracts, and was thus able to obtain unreasonably long terms. *See discussion at pp. 4-5, infra.*

[3] Initially the district court identified the relevant market as the market for concession services, i.e., sales of concession items to the public. The court of appeals then redefined the market as the sale of concession rights to concessionaires. On remand, the district court relied on the testimony of Sportservice's successor with the Athletics to define the market as the 118 franchise opportunities most attractive to large national concessionaires. Sportservice's "market share" was based on its share of revenues derived

(Footnote continues)

10, 1982, fifteen years after the contract breach, the Ninth Circuit affirmed the district court's opinion on the merits, and also awarded interest from the date of the original damage award (1972). 676 F.2d at 1316-17; App. A at 41a.

The court of appeals found that the arrangement between Sportservice and the Athletics was an unreasonable restraint of trade and an attempt to monopolize. It reasoned that Sportservice's exclusive contract put its share of the market "beyond the grasp" of Sportservice's competitors. 676 F.2d at 1304; App. A at 18a. In so doing, the court of appeals (aggregating the franchises of Sportservice and all of its affiliates) referred to all the factors relied upon by the district court in holding Sportservice's bargain illegal—its "market share" of the franchises in the relevant market,[4] the long terms of its franchises, the loans at interest rates below market and advances paid for the long terms, and the follow-the-franchise clauses—as cumulatively supporting its holding that the franchise contract here was an unreasonable restraint of trade. The attempt to monopolize finding flowed directly from the finding of restraint of trade because, under the Ninth Circuit rule, Sportservice's conduct was exclusionary and therefore a sufficient basis for inferring

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(footnote continued)

from its franchises in this group, but major league baseball franchise revenues were doubled, presumably because baseball franchises were considered the most attractive. In the final appeal this market definition and methodology and these market share calculations were affirmed.

[4] The relevance of the market shares used is open to serious doubt for several reasons: (1) the "market" excluded an extremely large number of franchises which national concessionaires held and competed for, but which were in the court's view too small to be significant competitive opportunities, App. C at 69a-73a; (2) the calculation of Sportservice's market share was based on a double counting of baseball revenues, although the peculiar importance of baseball revenues to potential market power was unexplained, App. C at 74a; (3) as this Court made clear in *United States v. General Dynamics Corp.*, 415 U.S. 486 and *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660, past market share is not determinative of the competition for "future increments of demand" in a bidders market like this one, and the number of franchises which have already been sold does not determine the level and intensity of competition for remaining franchises; and (4) Sportservice's market share, however measured, was declining throughout the period covered by the contracts. 365 F. Supp. at 239; App. E at 98a; Pl. Exs. 814, 609-11, 821-22, 827.

both that Sportservice had a specific intent to monopolize and that there was a dangerous probability of success.

The net effect of the lower court proceedings is that Finley's breach of contract has now been ratified by the courts, and Sportservice has been found liable for what may turn out to be millions of dollars in damages, interest, and attorney's fees.

REASONS FOR GRANTING THE WRIT

The antitrust laws are meant to promote and protect the forces of competition—to let parties make their own bargains based on the competitive variables of price, quality, and service, unaffected by collusion or undue market power. Here, this principle has been turned inside out. Without raising any legitimate antitrust issues, Finley has used the antitrust laws to release itself from its freely bargained contractual obligation.

Finley has also succeeded in establishing a legal standard that is actually anticompetitive. Viewed most favorably, the claim is that, in the wisdom of hindsight, it is *possible* that Finley would have been better off with a shorter contract and less compensation from Sportservice. By upholding that claim, the decision below in effect prohibits parties such as Sportservice from offering additional consideration in return for a longer contract, and other buyers and sellers are deterred from negotiating longer terms. Finley, however, has it both ways. Finley is allowed to keep the additional consideration Sportservice gave for the longer term, and to resell a second time the additional term of years Sportservice paid for. Even more bizarre, Finley collects treble damages for its "injury," i.e., agreeing to a long term contract and being paid too much.

Intervention by this Court is necessary to enforce and clarify the principle that a party seeking to upset his bargain—including a bargain structured as an exclusive franchise relationship—must demonstrate more than the availability of a better bargain; he must demonstrate that he was harmed by a practice which has or had an adverse impact on effective competition. By equating past franchise sales with market "foreclosure" without such a showing, the court below opened all long-term arrangements to antitrust attack. The result is

unnecessary uncertainty, risk, and cost for a significant body of commercial transactions.

1. By Refusing To Take The Approach This Court Directed In *Tampa Electric*, The Decision Below Unsettles The Legality Of Long-Term Exclusive Arrangements And Creates A Conflict In Approach Among The Circuits.

There is no restraint of trade under the Rule of Reason unless there is an impact on effective competition. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, established that this basic principle applies to long-term exclusive arrangements between buyers and sellers. The court below misapplied *Tampa Electric* and impaired the principle it stands for by ignoring the impact on effective competition and applying a merely mechanical analysis: Sportservice bought a substantial number of franchises; its competitors could not buy those franchises; therefore, competition to buy them was foreclosed.[5]

Thus, the impact found below was actually an impact on competitors. But all successful competition on the merits has the same sort of impact on unsuccessful competitors. The antitrust laws "were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co. v. United States*, 370 U.S. at 320." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488. An impact on competitors, or a restriction on the

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[5] Although *Tampa* directed attention to the particulars of the marketplace and the specific ways in which competition was adversely affected, the court of appeals below rejected out of hand petitioner's showing that there had been no anticompetitive impact. No court below ever examined the record relating to:

(1) the number of potential bidders for franchises and whether that number was changed, or affected at all, by the challenged contracts;

(2) the level and vigor of competition for concession franchises—either before, during, or after the existence of the Sportservice contracts; or

(3) whether, as a result of the challenged conduct, there was any effect on the "price, quality, and quantity" of the bids received by concession franchisors.

Without examination of these factors, there can be no principled finding of any impact on competition.

autonomy of one party to a contract, has no impact on competition if it does not otherwise affect the " 'price, quality, and quantity of goods and services.' " *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 at 53 n.21.[6] Where the antitrust laws are applied mechanically without such a showing, the ironic effect is an artificial constraint on a seller's discretion to sell what he wishes, on a buyer's ability to compete with other buyers, and inevitably on competition generally. *Cf. United States v. Colgate & Co.*, 250 U.S. 300.[7]

Following *Tampa Electric*, other circuits have recognized that merely showing the portion of a market covered by exclusive arrangements does not demonstrate what impact, if any, those arrangements might have on competition. *See, e.g., Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975); *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74 (6th

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[6] Judge Posner has succinctly stated the issue ignored below in addressing a situation where a supplier of product liability insurance dropped one distributor in favor of another:

> Now, there is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding where the antitrust laws have been violated. Those laws, we have been told by the Supreme Court repeatedly in recent years, are designed to protect the consumer interest in competition. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality . . . . No inference could be drawn that the result of excluding [the complaining competitor] under such circumstances would be to raise the price, or diminish the quality, of product liability insurance to the ladder industry.

Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Co., 1982-2 Trade Cas. (CCH) ¶ 64,813 at 72,026 (7th Cir. 1982).

[7] This Court made it clear in *Colgate* that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long-recognized right of a trader . . . to freely exercise his own independent discretion as to parties with whom he will deal." 250 U.S. at 307. The decision below would apply a mechanical standard—originally developed to prohibit restraints on sellers—to limit the ability of those same sellers to determine the scope and shape of what they sell.

Cir. 1981); *Magnus Petroleum Co. v. Skelly Oil Co.*, 599 F.2d 196 (7th Cir.), *cert. denied*, 444 U.S. 916 (1979). Unless more is required, the public is "depriv[ed] . . . of the advantages of exclusive dealing contracts over alternative arrangements" because exclusive arrangements carry a legal risk unrelated to their impact on the public interest in competition. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1252 n.75 (3d Cir. 1975). Nonetheless, confusion persists about what is required of a plaintiff alleging anticompetitive foreclosure. Despite *Tampa Electric*, the decision below illustrates the need for additional guidance because this Court "has failed to reconcile" the quantitative approach based on market share with the qualitative approach based upon the actual impact on effective competition, *Dillon Materials Handling, Inc. v. Albion Industries*, 567 F.2d 1299, 1305 n.19 (5th Cir.), *cert. denied*, 439 U.S. 832 (1978), and the circuit courts have been unable to do so.[8]

The practical reach of the decision below goes far beyond sports concessions. The features of Sportservice's activities which the court of appeals identified as being suspect are common, legitimate business practices.

For example, the aspect of Sportservice's contract the Ninth Circuit found especially suspect was its duration. Yet long terms are commonplace in real estate leases[9] and franchises. In fact, a recent report by the Department of Commerce shows that more than 43 percent of all business franchise agreements are for 20 years or longer,[10] and exclusive dealing

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[8] The confusion in the case law is likewise reflected in uncertainty among the commentators and in the antitrust bar. *See* L. Sullivan, *Handbook of the Law of Antitrust* (1977) at 479; A.B.A. Sec. Antitrust Law, *Antitrust Law Developments* 44 (1975).

[9] *See, e.g.*, "K.B. MacArthur Closes; Lease Goes to Circle Theatre Corp.," *Washington Post*, Aug. 26, 1982, at D-4, col. 2 (theatre lease "in excess of 25 years").

[10] U.S. Department of Commerce, Bureau of Industrial Economics, *Franchising in the Economy 1980-1982*, at 10 (1982). Interestingly, almost 20 percent of the franchise agreements are perpetual. *Id. See also* Franchising Practices Reform Act of 1976, *Panel Discussion on H.R. 8349 Before the Subcomm. of the House of Rep. Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 297-98, 301, 306 (1976) (Statement of Norman D. Axelrod, Vice President Public Affairs, McDonald's Corporation) (20-year terms for McDonald's franchises are common).

agreements containing such long terms have commonly been upheld by the courts.[11] The long terms of the franchises normally granted in the cable television field were brought to this Court's attention early last term in *City of Boulder*;[12] terms substantially in excess of those at issue here are commonplace.[13] Similarly, the United States government grants national park concessions for terms of up to 30 years.[14] If the decision below is allowed to stand, all these agreements—as well as all leases and similar agreements with terms which a subsequent court may find to be excessive—will be placed in jeopardy.

The other factors here which were stigmatized by the courts below are likewise legitimate and widespread. The accumulation of franchises, as well as the accumulation of other separate productive assets like distributorships and patents, has commonly been upheld by the courts;[15] paying more money for

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[11] *See, e.g., New York Automatic Canteen Corp. v. Automatic Canteen Co. of America*, 1963 Trade Cas. (CCH) ¶ 70,625 (S.D.N.Y. 1962); *Engbrecht v. Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962); *Illinois v. Convenient Food Mart, Inc.*, 21 Ill. App. 3d 97, 315 N.E.2d 124 (Ill. App. 1974). *See also Beemer v. Solar Oil Co.*, 96 N.J. Super. 50, 232 A.2d 447 (N.J. Super. 1967). Indeed, a 20-year Sportservice race track concession contract was upheld by a state court against antitrust challenge almost ten years ago. *See Maywood Sportservice, Inc. v. Maywood Park Trotting Ass'n*, 14 Ill. App. 3d 141, 302 N.E.2d 79 (Ill. App. 1973).

[12] *Community Communications Co. v. City of Boulder*, 102 S. Ct. 382.

[13] *See generally* Television Digest, Inc., *Television Factbook*, 583-a—1287-a (50 ed. 1981-82). *See also* " Rights Wars Are Growing in Cable TV," *Wall St. J.*, Aug. 25, 1982, at 21, col. 3. *See also* 47 C.F.R. § 76.31 (1982).

[14] *See* 16 U.S.C. § 3 (1976); U.S. Dept. of the Interior, National Park Service, "General Information Concerning the Granting of Concessions in the Areas Administered by the National Park Service" (undated).

[15] *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36; *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975); *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834; *Bayou Bottling, Inc. v. Dr. Pepper Co.*, No. 790253, slip op. (W.D. La. July 15, 1982); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982); *Lawlor v. National Screen Service Corp.*, 270 F.2d 146 (3d Cir. 1959). As *Fleer Corp.* and *Lawlor* make clear, the accumulation of franchises alone, like the mere accumulation of

(footnote continues)

an asset is merely price competition on the merits;[16] and coming to an agreement for a longer franchise rather than a shorter one is indistinguishable from patent or other licensing arrangements where the patentee, in the light of the offers available to him, makes a decision to license all or part of what he owns based on his judgment of his best interest.[17] There is simply no feature of the contract or the market at issue here which should justify the court's decision to remake the parties' bargain.

In sum, therefore, the Ninth Circuit court decision creates three types of harm by identifying useful, unobjectionable, and widespread business practices as the predicate for treble damages. *First*, it may mislead other courts into the same mechanical method of applying the Rule of Reason. *Second*, it may deter economically useful conduct merely because of the form of the arrangement; as *American Motor Inns* pointed out, *Tampa Electric* was calculated to avoid this result. 521 F.2d at 1251 n.75. And *third*, private litigants and people with "bad bargains" can presumably seize any of these "tainted" features to plead and prosecute an antitrust claim. Based on the decision below, the range of private contracts and arrangements vulnerable to antitrust claims is greatly widened. Only review by this Court can avoid the potential social cost of legal confusion, foregone business arrangements, and increased litigation.

(footnote continued)

patents or other assets, is not anticompetitive where, as here, there is no independent showing of market power, the franchises do not compete with each other, and the franchisors have effective competition available.

[16] The treatment of this issue by the courts below is in direct conflict with this Court's reasoning in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610. *Fortner* made it clear that more must be shown than that the defendant had a "deep pocket"; the defendant must possess a unique ability to offer cash and credit, such that a court could properly infer economic power in the credit market. In this case, as in *Fortner*, there was nothing to indicate that the loans and cash advances were anything more than the type of vigorous price competition the antitrust laws were intended to promote.

[17] *See General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, *aff'd on rehearing*, 305 U.S. 124 (a patentee may subdivide fields of use, reserving exploitation of one or more aspects of its patent rights to itself); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 135 (a patentee may "assign to another his patent, in whole or in part, and may license others to practice his invention.")

2. The Attempt To Monopolize Standards Employed By The Ninth Circuit Are In Conflict With Decisions Of This Court And All Other Circuits, And Yield Conclusions Contrary To The Facts.

The Ninth Circuit has long persisted in a singular approach to the "attempt" offense which is in conflict with the decisions of this Court and all other circuit courts of appeals. In this case, the Ninth Circuit found that a dangerous probability of monopolization could be inferred from Sportservice's conduct alone, even though its market share was declining.[18] In *ITT Continental Baking Co. v. William Inglis & Sons Baking Co.*, 668 F.2d 1014 (9th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3936 (U.S. May 11, 1982) (No. 81-2083), the Ninth Circuit made a similar inference where the defendant had a static 22 percent market share and the dominant firm had increased its market share from 41 to 52 percent. Such inferences contrary to the facts would be impossible anywhere but in the Ninth Circuit. The frequency with which attempt claims are brought in the Ninth Circuit demonstrates the impact of the conflict and emphasizes the need for this Court to reestablish the proper standard.[19]

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[18] *See* n.4, *supra*. As Sportservice's market share has declined, the number of competitors (Pl. Exs. 131, 309, 318, 455, 488, 493, 514, 522, 552) and the number of concession franchises available for competition (D. Exs. 131, 132) have increased dramatically. Although this factual material was emphasized and pressed by Sportservice below, neither court below actually faced or dealt with it.

[19] As noted in the *ITT Continental Baking Co. v. William Inglis & Sons Baking Co.*, petition for writ of certiorari, at 14 n.25, the Ninth Circuit's rule may well account for the unusually heavy private antitrust docket in that circuit:

> In fiscal year 1981 more antitrust appeals were taken to the Ninth Circuit than to any other circuit—135 of 391, or 35 per cent of all such appeals. The figure for the Ninth Circuit exceeded the cumulative total of the next three circuits. Annual Report of the Director of the Administrative Office of the United States Courts —1981, Table B7, at A-12 (prelim. ed. 1981). As Professor Handler has noted, the Ninth Circuit, by eliminating the dangerous probability element of Section 2 and thereby "encourag[ing] a greater number of . . . suits where evidence of market

(footnote continues)

The nature of the conflict may be simply stated. The decisions of this Court have shown that there are three essential elements for a finding of attempt to monopolize under Section 2 of the Sherman Act: (1) specific intent to monopolize; (2) predatory or anticompetitive conduct directed toward that end; and (3) a dangerous probability of monopolization. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172; *American Tobacco Co. v. United States*, 328 U.S. 781; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Lorain Journal Co. v. United States*, 342 U.S. 143; *Swift & Co. v. United States*, 196 U.S. 375.[20] Every circuit except the Ninth has followed this Court in requiring proof of each of these three elements before sustaining a finding of attempt to monopolize.[21] Only the Ninth Circuit has allowed all the

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(footnote continued)

power is all but nonexistent . . . has written over thirty opinions on this one topic since . . . [1964], or more than one third of all the appeals reported on attempted monopolization during that time in all the circuit courts." Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 174 (1980).

[20] In *Swift & Co. v. United States*, Justice Holmes said that:

> [w]here acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to . . . bring that result to pass, an *intent* to bring it to pass is necessary in order to produce a *dangerous probability* that it will happen. *Com. v. Peaslee*, 177 Massachusetts 267, 272 . . . [w]hen that intent and the consequent dangerous probability exist, [the Sherman Act], like many others and like the common law in some cases, directs itself against that dangerous probability . . . .
>
> . . . .
>
> . . . Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree.

196 U.S. at 396, 402 (emphasis added).

[21] *See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *White Bag Co. v. Inter-*

(footnote continues)

elements of an attempt to monopolize to be inferred from conduct alone—in this case conduct which was clearly competitive.

The general rule has a sound basis in the purposes of the antitrust laws. To avoid "the distinct possibility of over-deterrence [of] salutary and procompetitive conduct," *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41, this Court and all circuits except the Ninth have required a showing of both a specific intent to monopolize,[22] and a dangerous probability that a monopoly will be achieved,[23] before punishing unilateral competitive conduct.

(footnote continued)

national Paper Co., 579 F.2d 1384 (4th Cir. 1974); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982); *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1 (D.C. Cir. 1977).

[22] *See, e.g., Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Bowen v. New York News, Inc.*, 366 F. Supp. 651 (S.D.N.Y. 1973), *aff'd in part, rev'd in part on other grounds*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976) (intent not inferred from predatory practices not designed to eliminate competition); *Northwest Controls, Inc. v. Outboard Marine Corp.*, 333 F. Supp. 493 (D. Del. 1971) (specific intent not inferred from price manipulation held to be good faith business effort to meet competition); *Telex Corp. v. I.B.M. Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) (specific intent not inferred from price cuts justified by legitimate business economics); *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963) (neither rough competition nor unethical business conduct sufficient to infer specific intent to monopolize; the requisite intent must be present and predominant).

[23] *See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (no dangerous probability of monopolization where elimination of the plaintiff would only have raised defendant's market share from 2.7 to 3 percent); *Nifty Foods Corp. v. Great Atlantic and Pacific Tea Co.*, 614 F.2d 832 (market share which declined from 54.5 percent to 33 percent was inconsistent with a dangerous probability of monopolization); *White Bag Co. v. International Paper Co.*, 579 F.2d 1384 (market share insufficient to prove a dangerous probability of monopolization); *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094

(footnote continues)

Only the Ninth Circuit adheres to the view that neither proof of a relevant market nor the defendent's power in that market is essential to analysis of the attempt offense. *See Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) *and cases cited therein; California Steel and Tube v. Kaiser Steel Corp.*, 650 F.2d 1001 (9th Cir. 1981); *A.H. Cox & Co. v. Star Machinery Co.*, 653 F.2d 1302 (9th Cir. 1981); *ITT Continental Baking Co.*, 668 F.2d 1014. Thus, as the court of appeals noted below, "an attempted monopoly violation can be found with evidence of conduct alone" and this conduct may be merely "conduct forming the basis for a substantial claim of restraint of trade." 676 F.2d at 1309; App. A at 26a.

This approach is clearly unsound. Elimination of the element of a "dangerous probability" from the offense of attempted monopolization leaves "virtually no perimeters on the prohibitions of Section 2" J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2] n.32 (1982). Moreover,

> [i]t does not seem possible in any rational scheme to avoid entirely the question of the degree of power. In assessing restrictive business conduct that is at the same time ancillary to competition on the merits, the degree of market power seems inescapably relevant.

(footnote continued)

(1977) (20 percent share of the relevant market insufficient to prove a dangerous probability of monopolization); *Mowery v. Standard Oil Co.*, 463 F. Supp. 762 (N.D. Ohio 1976), *aff'd*, 590 F.2d 335 (6th Cir. 1978) (verdict directed in favor of defendant because plaintiff failed to produce any evidence of market structure, and therefore did not establish a dangerous probability of monopolization); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (no dangerous probability of monopolization where defendant's market shares in the relevant markets declined from 33 percent to 24 percent, 22.5 percent to 7.4 percent, and 31 percent to 16 percent); *United States v. Empire Gas Corp.*, 537 F.2d 296 (proof of 50 percent market share alone not sufficient to show a dangerous probability of monopolization); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (failure to provide market data or prove "economic power" in the market); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263 (D.D.C. 1976), *aff'd on other grounds*, 569 F.2d 666 (D.C. Cir. 1977) (no dangerous probability of monopolization where two competitors held larger shares of the market than the defendant.)

P. Areeda & D. Turner, *Antitrust Law*, at ¶¶ 831, 833d (1978). *See also* N. Smith, *Attempt to Monopolize: Its Elements and Their Definition*, 27 Geo. Wash. L. Rev. 227, 235 (1958). This case illustrates the point. No court below ever examined the state of competition in the relevant concession-franchise market and the "exclusionary" conduct shown here was nothing more than successfully bidding for a franchise. There was never any realistic possibility of monopoly in any relevant market.[24]

Section 2 is not and should not be "a general statutory prohibition of unfair competition,"[25] but this is essentially the impact of the Ninth Circuit rule. As demonstrated here, this rule allows a court to decide without an intelligible basis that past conduct was "unfair" and "therefore" that it was an attempt to monopolize, without ever linking the "unfairness" to any risk of monopoly power, and without ever considering evidence that there was no link. Thus every "bad bargain" becomes an opportunity to collect treble damages. *See* Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2] n.32 (1982). This Court should take this occasion to bring the legal standards of the Ninth Circuit into conformity with those of all other circuits.

3. The Award Of Automatic Damages Without Any Showing Of Antitrust Injury Is Inconsistent With Prior Decisions Of This Court.

The decision below awards damages on two assumptions: *first*, the assumption that Finley was damaged; and *second*, a further assumption that the damage was a result of the restraint it found. It is the prospect of just such windfall recoveries as this which swell the ranks of antitrust plaintiffs, distort the defense of antitrust claims, and penalize competitive conduct without justification. Review by this Court is necessary to reassert the proper bounds of antitrust recovery, and remove

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[24] *See* n.18, *supra*.

[25] P. Levine, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 Colum. L. Rev. 1451, 1467 (1973); *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512; *Hunt v. Crumboch*, 325 U.S. 821; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Lorain Journal Co. v. United States*, 342 U.S. 143.

the "lottery" incentive for making antitrust claims in the absence of actual competitive injury.

a. Finley never established either the fact or the amount of any injury.

Recovery under Section 4 of the Clayton Act requires a showing of injury in fact. As this Court has recently stated, Section 4 "focuses on tangible economic injury." *Blue Shield of Virginia v. McCready*, 102 S. Ct. 2540. The treble damage remedy is an integral part of the antitrust enforcement process, but "the potency of the remedy implies the need for some care in its application." 102 S. Ct. at 2548. The courts below instead awarded damages to Finley based merely on the finding of a violation, without any examination of whether Finley had in fact been injured. This presumption of injury conflicts with this Court's rejection of arguments that the finding of an antitrust violation automatically "gives rise" to a treble damage claim. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562.

The facts here offer a particularly striking illustration of the "automatic damages" problem addressed in *J. Truett Payne*. The primary purpose of any damage recovery is compensation — putting the plaintiff in the same position as it would have been in absent the defendant's wrong-doing. C. McCormick, *Damages* 560 (1935); A. Corbin, *Contracts* § 992 (1964); *Restatement (Second) of Torts* § 901 (1979). Because Section 4 of the Clayton Act "is essentially a remedial statute," damages must be measured by a realistic appraisal of "what plaintiff's situation would have been in the absence of the defendant's antitrust violations." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 566.

Finley's notion of antitrust injury cannot be reconciled with its theory of liability: Finley has never attempted to show how or why it would have been better off financially if there had been no violation—that is, on its theory, if there had been no offer of additional consideration for a longer term.

The measure of damages adopted below does not face this issue at all. The courts below measured Finley's "injury" by comparing the percentage of revenues paid by Sportservice to

Finley with the percentage of revenues paid to the successor Kansas City baseball team by its franchisee. First, the comparison is between franchises awarded by different clubs at different times for different places without taking into account any of those factors. Second, and most importantly, the comparison measures only *part* of the consideration paid by Sportservice against *all* of the consideration paid by the other concessionaire. No effect was given to the prepayments — in the form of low interest rate loan and payment advances or both — made by Sportservice; nor was the critical issue of what the Athletics would have been paid by Sportservice if there had been no "violation" ever addressed.

While this point is not articulated by the courts below, it may be that the prepayments made by Sportservice were ignored because they were mistakenly viewed as improper. But proper or not — and as the discussion above makes clear, they were merely price competition on the merits — they are necessarily relevant to a calculation of the actual damages suffered by Finley. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140; *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Proper damages analysis in an antitrust case, must take account of *all* the elements of price. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648-49; *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 618.[26] It is necessary to "offset injuries which the plaintiffs may have suffered at the

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[26] A similar issue is now before this Court in *Weyerhaeuser Co. v. Lyman Lamb Co.*, 655 F.2d 627 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3743 (U.S. Mar 2, 1982) (No. 81-1618). In that case, one of the questions presented by the petitioner is the following:

> Can the measure of damages in cases involving the alleged fixing of only one element of price be based solely on that single element, or must it reflect the challenged conduct's effect on the total price paid by the buyer?

If the second part of this question is answered in the affirmative in *Weyerhaeuser*, the present case would also have to be reversed and remanded for recalculation of damages. Whatever the result in *Weyerhaeuser*, however, this case is clearly inconsistent with the holding in *J. Truett Payne* and thus must be reversed for that reason alone.

hands of the defendants with benefits which they have derived from the very activities they attack." P. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127 (1976), *cited with approval in Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 487 n.11.

b. Any "injury" suffered by Finley was not "antitrust injury" as required by *Brunswick v. Pueblo Bowl-O-Mat.*

A pattern of "predatory purchasing" was Finley's theory of violation. The general length of Sportservice's contracts, it was argued, was the result of "lavish" loans and "pay-offs" to the franchise sellers. Finley was supposedly hurt because, as a result of length of its contract, it was not able to sell the franchise rights again when it wanted to. But assuming an arms-length bargain in the first place—a point never disputed by Finley—Finley could logically suffer antitrust injury *only* if competition for the original term of sale was affected by the challenged conduct. Not only was no evidence offered on this point, but Finley's own theory of liability—that the price paid by Sportservice was higher by virtue of the loans and advances which were part of the allegedly anticompetitive scheme—is flatly inconsistent with any notion of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489.

Indeed, as was also true in *Brunswick*, " [i]t is inimical to the purpose of the antitrust laws to award damages for the type of injury claimed here." 429 U.S. at 488. Finley after all, is neither a coerced seller (compare *Perma Life*, 392 U.S. 134) nor a foreclosed buyer. Stripped to its essentials, Finley's complaint is that the contractual obligations that it undertook when it purchased the Athletics limited its eventual profit opportunities, and thus it made less money than it would have made if it had not taken on those contractual obligations. Finley seeks to recoup this "loss" by arguing not that competition was injured in some way by the arrangement between Sportservice and the Athletics, but that Sportservice's competitors were somehow restrained. Because of that "violation,"

Finley argues, *it* is entitled to ignore *its* contract, and to be compensated as it *might have been* if the contract never existed.

As this Court noted in *Kelly v. Kosuga*, 358 U.S. 516, however, "[a]s a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court." 358 U.S. at 518. Any other rule would violate this "overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" [citation omitted]. 358 U.S. at 520.

What Finley seeks to recover here is nothing more than a windfall: it seeks to retain the benefits of Sportservice's alleged "overpayments," use the fact of those "overpayments" to break the contract to take advantage of what it now perceives to be a better bargain, and collect treble "damages" as well. This Court should not permit this result to stand, for "the desire to encourage private enforcement and to penalize antitrust violations is no excuse for awarding damages that are nonexistent ...." P. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127 (1976).

CONCLUSION

The decision below is in conflict with the decisions of this Court and of other circuits. The petition for certiorari should be granted.

Respectfully submitted,

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82-396

No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TWIN CITY SPORTSERVICE, INC., *et al.*,
Petitioner,

vs.

CHARLES O. FINLEY & COMPANY, INC., *et al.*,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

NINTH CIRCUIT OPINION, MAY 16, 1983

Appendix A

United States Court of Appeals

NINTH CIRCUIT

Nos. 80-4196, 80-4233.

TWIN CITY SPORTSERVICE, INC.,
a Missouri corporation,
Plaintiff-counterdefendant-appellant and cross appellee.

and

Sportservice Corporation; a New York corporation,
Counterdefendant-Appellant and Appellee.

v.

CHARLES O. FINLEY & COMPANY, INC.,
an Illinois corporation; Defendant-counterclaimant-Appellee
and cross Appellant,

and

Charles O. Finley; Shirley M. Finley;
Charles O. Finley, Jr.; Paul M. Finley;
Sharon Kesling; and Kathryn Perlmutter,
Defendants-Appellees cross Appellants.

Argued and submitted Oct. 14, 1981.

Decided May 10, 1982.

John P. Frank, Phoenix, Ariz., for Twin City Sportservice, Inc.

William G. Myers, Chicago, Ill., for Charles O. Finley & Co., Inc.

On appeal from the United States District Court for the Northern District of California.

Before DUNIWAY and ANDERSON, Circuit Judges, and KELLEHER, District Judge.*

J. BLAINE ANDERSON, Circuit Judge:

I. INTRODUCTION

This litigation began in 1967 when Twin City Sportservice, Inc. (Sportservice)[1] filed suit against Charles O. Finley & Company, Inc. (Finley),[2] seeking relief from Finley's alleged breach of its 1950 concession contract with Sportservice. Finley counterclaimed against Sportservice and its parent corporation, Sportservice Corporation (Sportservice), and alleged that the contract violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The contractual issues have long been decided in favor of Sportservice; however, issues involving the antitrust defense and counterclaims, twice decided in Finley's favor, are presently before this court for the second time.

The contractual and antitrust issues were originally bifurcated for trial before Justice Clark with Sportservice prevailing on its contract claims by judgment in 1970, and Finley prevailing on the antitrust defense and counterclaims in 1972. *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F.Supp. 235, 237-38 (N.D.Cal. 1972). Sportservice appealed, and this court reversed Justice Clark's determinations of an antitrust liability, remanding for the purpose of receiving new evidence directed toward the definition of the relevant market. *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975) (*Finley I*). Upon remand, the district court (per Judge Peckham) received additional evidence regarding the relevant market pursuant to this court's instructions in *Finley I*, and again found for Finley on its

* The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

[1] Throughout this opinion, "Sportservice" refers to both Twin City Sportservice, Inc., and its parent corporation, Sportservice Corporation.

[2] By order of October 14, 1981, the noncorporate appellees and cross-appellants were added to this litigation. Throughout this opinion, "Finley" shall refer to all appellees and cross-appellants.

antitrust claims. Sportservice now appeals from Judge Peckham's judgment for Finley, and Finley cross-appeals for application of interest from the date of Justice Clark's first judgment and for an increased attorney's fee award. In his last memorandum and order addressed to this litigation, Judge Peckham remarked, "We now conclude what should be the denouement in a long and tangled story." Shortly thereafter, that optimistic prediction of finality was frustrated by the present appeal. Although we reverse on issues regarding interest and attorney fees, our affirmance of Judge Peckham's findings and conclusions of antitrust liability compels us to affirm his additional conclusion that this indeed should be the denouement in this long and tangled story.

II. RELEVANT MARKET

A. Prior Proceedings

The protracted history of this litigation is due in large measure to the parties' dispute over the relevant market. At the first trial, Justice Clark concluded that the relevant market consisted of "major league baseball concessions." 365 F.Supp. at 245.[3] This court rejected such a market on prior appeal for basically two reasons: (1) it erroneously focused upon the concessionaire as the seller of concession services and the baseball club or facility as the buyer—rather than considering the concessionaire as the buyer of a concession franchise and the baseball club or facility as the seller of such a franchise, and (2) it was erroneous in scope in that it was limited to concession franchises associated with major league baseball, excluding other franchises associated with other facilities and events. *Finley I*, 512 F.2d at 1272. However, our rejection of Justice Clark's market was accompanied with instructions to the district court on remand. *Inter alia*, the district court was instructed that:

[3] The parties and prior courts agree that the relevant geographic market in this case is national. While we confine our terminology to "relevant market" in other contexts, it would more appropriately be referred to as the relevant product market to distinguish the analysis from geographic market.

"[T]he relevant market with which we are concerned here is one in which the articles of commerce are franchises, not concession services . . . .

. . .

. . . [A] concessionaire is a buyer in the franchise market and a seller in the concession market. . . .

. . .

It follows that the relevant franchise market cannot be limited to those offered for sale by major league baseball teams. . . .

. . .

. . . The franchise market with which the trial court should be concerned on remand of this case is that which envisions the sale by the concessionaire of a limited range of concession items to spectators in a closed area, either by vendors, stands, or both, where the preparation requires at most a grill and not a kitchen. The leisure time activities with respect to which franchises within the relevant market are available are undoubtedly numerous. They may include all or a substantial number of the following: *viz.*, football, basketball, hockey, soccer, boxing, racing, track and field, rodeos, circuses, and music festivals. Likewise the sellers of such franchises may include professional teams, sports organizations and public and private operators of stadiums, arenas, race tracks, convention centers and amusement parks."

In summary, this court furnished the district court with two additional guidelines:

> "We conclude these guides to the trial court by observing that in establishing the relevant franchise market the trial court (1) should apply the test of reasonable interchangeability and (2) should treat the leisure time activity or facility manager as the seller of the franchise and the concessionaire as the purchaser."

512 F.2d at 1272-74.

With this guidance, the district court, on remand (per Judge Peckham), received additional evidence and found a

new relevant market by performing a two-part analysis. The court remarked:

> "In sum, the task which emerges from these guidelines has two steps. First, the court must determine what facilities, considered in terms of the techniques and skills of their concession operations, are reasonably interchangeable with major league baseball franchises. This substitutability of production in the concession products market defines the outer limits of the franchise market. Second, the court must determine which franchises within these outer boundaries are found by national concessionaires to be reasonably interchangeable in use."

March 31, 1977 Memorandum and Order, at 7-8.

The result of the district court's first step, an analysis of substitutability of production in the concession products market, defined the broad "outer limits" of the possible market as consisting of "stadiums with major league baseball and/or football, arenas with major league basketball and/or hockey, arenas without major league sports, auto racing tracks, and certain amusement parks."[4] March 31, 1977 Memorandum and Order, at 11. The result of the second step, an analysis of the substitutability of use in the concession franchise market, yielded a total of 118 possible concession franchises within the

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[4] The district court eliminated a number of facilities and activities that had been suggested by this court on prior appeal to be in the possible zone of production substitutes. *See*, 512 F.2d at 1274. The district court concluded that boxing, soccer, rodeos, circuses, music festivals, and track and field events take place in facilities already considered to be within the zone of production substitutes and that those facilities "generally do not offer a separate and additional franchise for their concession operations." March 31, 1977 Memorandum and Order at 10. The court also noted that fairs do not usually offer the type of concession franchise at issue in this litigation, and that "horse racing, dog racing, and convention centers all must be excluded because the use of a kitchen for providing full dinners is an important part of their operation." *Id.*

relevant market. Of that number, the district court below found that Sportservice controlled 24 percent.[5]

B. Arguments on this Appeal

Sportservice attacks the post-remand definition of the relevant market on many specific fronts, but its general argument is that the district court, on remand, failed to adhere to this court's instructions in *Finley I*. Sportservice reads our instructions as explicitly defining the types of facilities and categories of events that should be included in the relevant market, leaving the district court with the sole obligation of finding the correct numbers. Finley, on the other hand, reads this court's instructions on prior appeal as more general guidelines fully supporting the district court's actions in finding the new relevant market. We agree with Finley.

On prior appeal, we reversed and remanded because a market limited only to major league baseball concession franchises was deemed too narrow. We instructed the district court to supplement the record with evidence of concession franchises that were reasonably interchangeable with the type of franchise serving major league baseball teams. This court intended for the district court to resume its inquiry into the possible addition of concession franchise opportunities which would comprise a more reasonable relevant market under the facts of this case. Our prior opinion did not specifically define the types of events and facilities in the relevant market, nor did it determine the number. Our prior decision stated only that a focus on major league baseball was too narrow, that that focus had resulted from Justice Clark's emphasis upon the market for the sale of concession services rather than the concession franchise market as the relevant line of commerce, and from his failure to

[5] This market control figure of 24% compares with a finding of 50% control of the major league baseball concession market after the first trial. *See*, 365 F.Supp. at 250. The 24% figure represents the result of a "weighted" calculation of Sportservice contracts by doubling the number of those held by Sportservice at major league baseball facilities. This weighting was performed pursuant to evidence submitted that major league baseball concession franchise revenues average twice that of other major league sports concessions.

examine the franchise market for which reasonable interchangeability among concessionaires like Sportservice existed.

Sportservice appears to have little difficulty with the district's court's initial narrowing of the concession franchise market performed by the first step of finding those concession franchises for which substitutability of production in the concession products market exists. Such a narrowing is proper. *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 691 (9th Cir.), *cert. denied*, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976). Sportservice does take issue with the district court's second narrowing—the determination of reasonable interchangeability in use or demand by national concessionaires among the concession opportunities left after the first paring. As discussed, the district court, on remand, performed the second step by narrowing the market to only those concession franchise opportunities for which we could reasonably expect to find competition among national concessionaires—concessionaires competing with Sportservice. The district court performed the second step by essentially adopting the minimum gross receipts requirements offered by Finley's expert witness, Mr. Vincent Pantuso, an executive with a competing national concessionaire, Interstate United Corporation. It is the use of the Pantuso testimony and the resultant market exclusions that form the specific contentions of Sportservice on this appeal. Because we feel that it was reasonable for the district court to have used the Pantuso testimony in establishing the relevant market in this case, we need not discuss Sportservice's arguments concerning the exclusion of "satellite" or "proximate" concession franchises, nor the exclusion of college football concession franchises.[6]

Sportservice contends that the district court placed undue emphasis upon the testimony of Mr. Vincent Pantuso who testified that, in his opinion, a national concessionaire would

[6] The record indicates that the satellite concessions and college football concessions do not produce sufficient income in order to meet the Pantuso threshold tests; thus, our affirmance of the district court's findings of the relevant market, using the threshold tests, supports the district court's exclusion of satellite and college football concessions.

not seek out a concession franchise that yielded less than $25,000 annually in net profits or produced less than $250,000 annually in gross receipts. Sportservice argues that this testimony was the basis for the district court's narrow delineation of the relevant market; that Mr. Pantuso's opinion as to the threshold dollar factors used by national concessionaires is not shared by all national concessionaires; and, by relying upon this testimony, the district court incorrectly applied the tests for relevant market that were stated by this court on prior appeal. We disagree.

We do not think that the law of this case or antitrust law, in general, constrained the district court to the extent asserted by Sportservice on this appeal. We note that "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336, 82 S.Ct. 1502, 1530, 8 L.Ed.2d 510, 542 (1962). It is correct, as Sportservice argues, that this court did not explicitly dictate that the market in this case be limited to concession opportunities which would attract only national concessionaires. However, we did not preclude such a conclusion after evidence was received on remand that such was a reasonable view of the facts and circumstances related to this litigation. Similarly, we did not dictate that the district court receive evidence of minimum dollar volume figures to determine a competitive threshold for which concession franchise operations are reasonably interchangeable with major league baseball concessions, but we did not preclude such testimony. In view of the record now before us, we think Mr. Pantuso's profitability and gross receipts tests offered a reasonable approximation of the size of concession franchise opportunities for which there is realistic competition in the concession franchise market.[7] The definition of the relevant market is basically a fact question dependent upon the special characteristics of the industry involved and we will not disturb

[7] In addition to the Pantuso testimony, the record indicates that Mr. Richard P. Komen, who represented himself as manager of Volume Service Company in 1971 when he testified before Justice Clark, affirmed that he also used a $250,000 gross sales threshold figure to determine whether his company would be interested in obtaining a concession franchise.

such findings unless clearly erroneous. *See, Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 915 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1976); and *Sulmeyer v. Coca-Cola Company*, 515 F.2d 835, 849 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976). For the reasons expressed herein, we hold that the district court's finding of the relevant market is not clearly erroneous.

Although the search for the relevant market is basically a factual inquiry, it deserves noting that the district court also properly followed precedent in this area by restricting the relevant market to one in wherein commercial reality exists. In defining a relevant market for Sherman Act purposes, the court must consider distinction in degree as well as kind. *International Boxing Club v. United States*, 358 U.S. 242, 251, 79 S.Ct. 245, 250, 3 L.Ed.2d 270 (1959); *United States v. Grinnell*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Sportservice argues that "[t]he record requires a finding that the relevant market includes all of those types of facilities which sell or can sell franchises for concession products prepared with at most a grill and not a kitchen." In support of this definition, Sportservice proceeded to prove the number of facilities and events of the type described, and, by use of a marketing report and a survey performed for this litigation, Sportservice argues that it controlled only 4 percent of the above-described types of concession events and facilities during the relevant period. Such a definition and estimate of market foreclosure simply ignores commercial reality. In order to abide by the dictates of *International Boxing Club* and *Grinnell*, and determine where "meaningful competition" exists, *United States v. Continental Can Co.*, 378 U.S. 441, 449, 84 S.Ct. 1735, 1743, 12 L.Ed.2d 953 (1964), it was appropriate for the district court to nave narrowed the relevant market to those concession franchises for which reasonable substitutability in demand among national concessionaires can be found. The artificially large relevant market proferred by Sportservice lacks the above characteristics. Sportservice's attempt to have this court adopt a relevant market of 2,000 to 11,000 concession franchises fails because such a market simply does not represent an estimate of

meaningful competition. It makes no effort to group concession franchises by size of operations or profitability—two characteristics found by the district court to be especially relevant given the national concessionaire's typical economics of scale. The record in this case amply supports the district court's finding that effective competition was limited to the 118 concession franchises comprising the relevant market.

It is also worth noting that the effort to find a relevant market in this litigation was not performed without purpose. A definition of a relevant market was necessary in order to assess possible Sherman Act violations. As for the determination of a Sherman Act section 1 violation, an unreasonable restraint of trade, this court sanctioned the use of the tests stated in *Tampa Electric Company v. Nashville Coal Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961). That case sets out a three-part test: (1) a determination of the line of commerce involved, (2) a determination of the "area of effective competition," and (3) a determination of whether competition has been foreclosed in a substantial share of the relevant market. *Id.*, 365 U.S. at 327-29, 81 S.Ct. at 628-29, 5 L.Ed.2d at 587. We noted in *Finley I* that the first two tests basically outline a determination of the relevant market. *See* 512 F.2d at 1275. We note here that a finding of the "line of commerce" is not significantly different from the first narrowing performed by the district court below. Substitutability in production, while a more technical term of art, is another way of describing the analysis required by the first *Tampa Electric* test, that of broadly defining the type of business engaged in by competitors in the concession franchise industry. The line of commerce for this case was found to be concession products sold to people in a closed area where preparation of the products requires at most a grill and not a kitchen. *See Finley I*, 512 F.2d at 1274. Although Sportservice would have the analysis begin and end with this definition of the line of commerce, *Tampa Electric*, as well as other authorities, dictate further inquiry—we must search for the "area of effective competition" within this line of commerce.

This second inquiry does not significantly differ from the district court's second paring of the market in the instant case.

The district court found that effective competition existed only for concession franchises that a national concessionaire would find profitable by reason of dollar volumes. The record amply supports the district court's finding that effective competition did not encompass every concession franchise within the relevant line of commerce. In our minds, an analysis of substitutability in demand or use of franchises in the concession franchise market is another way of describing a method used to test for the area of effective competition under *Tampa Electric.* The district court, therefore, properly applied the first two *Tampa Electric* tests in its finding of the relevant market.

In conclusion, we affirm the district court's finding of the relevant market below. We feel it is reasonable given the post-remand record, that it accurately applies the instructions of this court on prior appeal, and that it is supported by fact and case law. Moreover, substantial evidence supports the district court's finding that Sportservice controlled 24 percent of the relevant market.

III. SUBSTANTIVE LIABILITY

A. Prior Litigation

After the first trial in this case, Justice Clark concluded that Sportservice had committed four separate antitrust violations: (1) an unreasonable restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. §1; (2) an attempted monopoly of the relevant market in violation of section 2 of the Sherman Act, 15 U.S.C. §2; (3) a *per se* violation of section 1 of the Sherman Act, 15 U.S.C. §1, resulting from an illegal tying relationship between Sportservice and its franchisors; and (4) a market foreclosure constituting a monopoly in violation of section 2 of the Sherman Act, 15 U.S.C. §2. *See, Twin City Sportservice v. Charles O. Finley Co., Inc.,* 365 F.Supp. 235, 252-54 (N.D.Cal.1972).

In *Finley I,* this court reversed all of the above legal conclusions of liability, and specifically held that no per se tying violation could be found from the facts presented in the record. 512 F.2d at 1275-76. The district court immediately below (per

Judge Peckham) determined that Sportservice's share of the relevant market was not sufficient to support an actual monopolization claim. Finley does not appeal from this ruling. Thus, with the actual monopoly and the tying claims eliminated, this appeal focuses only upon the first two violations stated above; i.e., whether the trial court below erred in finding an unreasonable restraint of trade in violation of section 1 of the Sherman Act and an attempted monopoly in violation of section 2.

B. Restraint of Trade Violation—Sherman Act Section 1

After redefining the relevant market, Judge Peckham below found that Sportservice's competitive position in the relevant market, brought about through Sportservice's ability to procure contracts similar to the one involved in the instant case, constituted an unreasonable restraint of trade in the relevant concession franchise market. Judge Peckham determined that an unreasonable restraint of trade had been evidenced not only by Sportservice's 24 percent share of the relevant market, but also from its continuing pattern of conduct that produced that market share. The district court pointed to evidence of Sportservice's consistent pattern of obtaining contracts of unreasonable duration, often coupled with the use of "follow-the-franchise" clauses and, in many cases, the predatory use of its financial strength to obtain its favorable concession franchise agreements. The district court concluded, "[The long-term franchise contracts] represent classic examples of artificially created barriers to effective entry into and competition within the market."

With the district court's conclusion of section 1 liability, Sportservice raises the following issues: (1) that exclusive-dealing antitrust case law does not apply to this case, (2) that the district court improperly aggregated all of Sportservice's contracts in the relevant market in finding a section 1 violation, (3) that the district court did not perform a rule of reason analysis, and that the district court's determination of section 1 liability places this case in conflict with an alleged trend in the law of franchise contracts which promotes long-term contracts, and (4) that certain findings of the district court were either

unsupported by the record or clearly erroneous. We disagree and affirm the district court's conclusion of section 1 liability for the reasons expressed below.

1. Applicability of Exclusive-Dealing Case Law

Sportservice argues that its contract with Finley is not a "typical" exclusive-dealing arrangement, thus questioning the district court's use of exclusive-dealing antitrust case law, specifically, *Tampa Electric, supra,* in evaluating its section 1 violations. It argues that the case law is inapposite because *Tampa Electric* and other exclusive-dealing cases involve questions of the propriety of the exclusivity *per se* of arrangements, while the exclusivity of the arrangement involved in Sportservice's concession franchises is not an issue in this case. The problem with using the exclusive-dealing cases, Sportservice continues, is that the district court in this case found a violation solely on the basis of the length of the contract with Finley, not its exclusivity. This argument is devoid of merit.

First, this court sanctioned the use of the tests started in *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961), an exclusive-dealing case, to determine whether Sportservice's conduct evidenced a violation of section 1 of the Sherman Act. *See* 512 F.2d at 1275. Sportservice raised no contention on remand with this determination, and Sportservice's argument on this appeal does not persuade us to deviate from the instructions we gave the district court in *Finley I.* The focus of the tests in *Tampa Electric* is to first find a relevant market and then assess whether competition has been foreclosed in a substantial share of the relevant market. The purpose of the tests clearly is to determine the anticompetitive effects of exclusive-dealing arrangements. The tests are therefore applicable whether the specific issue involves exclusivity *per se,* or whether it involves, as in this case, the methods used to procure exclusive contracts and the nature and extent of the anticompetitive influence of these contracts on a substantial share of the relevant market.

Second, we do not confine our analysis to only the Finley-Sportservice contract, *see* section III.B2, *infra,* nor do we confine it to the finding of unreasonable contract length. As

pointed out, the district court found a section 1 violation from Sportservice's market share and its conduct in achieving that share through the use of unreasonably long concession franchise agreements, follow-the-franchise clauses, and predatory cash loans and advances. Sportservice oversimplifies the district court's rulings by arguing that it simply holds contracts of greater than ten years' duration to be a violation of section 1. We affirm the district court's conclusion that a section 1 violation was presented by the evidence for all of the reasons expressed by the district court, not simply that the contracts were too long. For the above reasons, Sportservice's attempt to distinguish the facts of this case from the other exclusive-dealing cases fails.

2. The One Contract, Aggregation Issue

Sportservice argues that it was improper for the district court to have aggregated other contracts in the relevant market with the Finley-Sportservice contract to determine Sportservice's antitrust liability; that the district court should be limited to looking only to the one contract between Finley and Sportservice; and if such were done, the evidence shows that Sportservice controlled less than one percent of the relevant market. To support its argument, Sportservice cites to a number of cases which hold that various private antitrust plaintiffs in various factual contexts do not have standing to assert antitrust violations that affect them only indirectly.

Reliance on these cases is misplaced; indeed, reliance on a standing argument misconceives the issues in this case. The issue here is not whether Finley has standing to complain of Sportservice's antitrust violations; there is no question that Finley suffered a direct injury from Sportservice's conduct. Instead, the issue is whether a district court, in assessing the antitrust liability of a defendant, may look to the overall effects of a defendant's conduct in the relevant market, or is limited to looking at the market implications of the one contract between the antitrust plaintiff and defendant. At least in the factual context of the instant litigation, we think the district court correctly assessed Sportservice's aggregate pattern of conduct in the relevant market.

In *Fortner Enterprises v. U. S. Steel Corp.*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969), the Supreme Court sanctioned the use of aggregation analysis in a case involving an alleged tying violation, stating:

> "[A] narrow focus on the volume of commerce foreclosed by the particular contract or contracts in suit would not be appropriate in this context. As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition."

Id., 394 U.S. at 502, 89 S.Ct. at 1258, 22 L.Ed.2d at 504. We feel that the policy for allowing aggregation as expressed in *Fortner* equally applies to the instant case.

Sportservice admits that the government may sue on aggregate anticompetitive conduct, *see, e.g., Standard Oil Co. of California and Standard Stations, Inc., v. United States*, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949) (*Standard Stations*), but offers little justification for us to adopt a limitation on private antitrust plaintiffs. We decline to formulate any distinction between public and private antitrust plaintiffs here for the same reasons expressed by the district court below. Creating such a distinction would require courts to enforce arguably innocuous single contracts that belong to a pattern of contractual relations that significantly restrain trade in a relevant market. Moreover, we support the district court's citation to other case authority allowing private plaintiffs to litigate antitrust defendants' aggregate pattern of allegedly illegal behavior.[8]

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[8] In addition to *Tampa Electric, supra*, and *Fortner*, the district court cited a number of cases wherein aggregate market activity was looked at in assessing antitrust violations. These include: *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049, 92 S.Ct. 715, 716, 30 L.Ed.2d 740 (1972) (action by tool distributor against tool manufacturer for alleged violations of section 2(a) of the Robinson-Patman Act and others); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964) (action by

(*footnote continues*)

Sportservice also asserts that the law of this case supports its no aggregation argument. On prior appeal, we said that it was "necessary to establish the proper relevant market before it can be determined whether a particular exclusive-dealing arrangement unreasonably restrained competition in a substantial share of that market." 512 F.2d at 1274-75. Sportservice would emphasize the word "particular" to reinforce its one contract argument. We read that language differently. It is consistent with *Finley I* to look at Sportservice's total arrangement of entering into concession contracts with the facilities owners on an aggregate basis in order to determine Sportservice's antitrust liability. Nothing in our prior opinion suggested that aggregation of Sportservice's contracts in the relevant market was prohibited, and we find no compelling reasons to adopt such a principle at this juncture. We therefore hold that it was proper for the district court to have aggregated Sportservice's contracts in the relevant market in order to assess the Sherman Act violations resulting from these contracts.

3. Rule of Reason Analysis

a. General Application of the Rule

Sportservice argues that Judge Peckham did not apply or that he incorrectly applied the rule of reason when he concluded that Sportservice had violated section 1 of the Sherman Act. The record fails to support this contention.

We recognize that an exclusive-dealing arrangement does not constitute a *per se* violation of section 1, *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580

(*footnote continued*)

lessee and dealer of petroleum products against oil company for alleged violations of Sherman and Clayton Acts from oil company's dealings with its dealers). Even though the issue may not have been raised in these other cases, we find that the above cases support the district court's conclusion that aggregation of market contracts and activity in assessing various antitrust violations is understood. Sportservice's attempts to distinguish the cases focus on insignificant distinctions between the above cases and the instant case which we reject without elaboration.

(1961);[9] *Brown v. Hansen Publications, Inc.*, 556 F.2d 969, 970 (9th Cir. 1977). Therefore, any particular exclusive-dealing arrangement does not violate section 1 unless it is found to be unreasonable. *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *Ron Tonkin Gran Turismo v. Fiat Distributors*, 637 F.2d 1376, 1381 (9th Cir.), *cert. denied*, — U.S. —, 102 S.Ct. 128, 70 L.Ed.2d 109 (1981). The reasonableness inquiry asks whether the restraint in question "is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637, 650 (1978), *quoting, Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683, 687 (1918).

First, it deserves mention that Judge Peckham below expressly applied the rule of reason. After concluding that

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[9] *Tampa Electric, supra*, involved a challenge to a requirements contractual arrangement under both section 3 of the Clayton Act, 15 U.S.C. §14, and sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. The Court limited its discussion to the application of section 3 of the Clayton Act and concluded that:

> "even though a contract is found to be an exclusive-dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected."

Tampa Electric, supra, 365 U.S. at 327, 81 S.Ct. at 628, 5 L.Ed.2d at 586-87.

The Court did not reach the plaintiff's Sherman Act section 1 claim, noting that it was unnecessary to do so since the exclusive-dealing arrangement in *Tampa Electric* did not violate the broader proscriptions of section 3 of the Clayton Act. The Court in *Tampa Electric* held that before a Clayton Act section 3 violation can be found, lower courts must determine whether exclusive-dealing arranagements have the requisite anticompetitive effect upon a substantial share of the relevant market. The anticompetitive impact, *vel non*, of conduct challenged under section 1 of the Sherman Act is also the focus of the rule of reason analysis. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637, 650 (1978). We therefore read *Tampa Electric* to support the conclusion that exclusive-dealing arrangements challenged under section 1 of the Sherman Act cannot be considered as *per se* violations. In so concluding, we reiterate what was said in *Finley I* that a greater showing of anticompetitive effect is required to establish a Sherman Act violation than a section 3 Clayton Act violation in exclusive-dealing cases. *See Finley I, supra*, 512 F.2d at 1275.

Sportservice's contracts demonstrated anticompetitive effects, the district court considered whether the contracts nonetheless were justifiable or reasonable. Employing the tests in *Standard Stations, supra,* Judge Peckham concluded that the Sportservice concession franchise contracts in the relevant market created entry barriers into that market which foreclosed competition in an unjustifiable manner.

Sportservice feebly argues that the record does not demonstrate a foreclosure of competition, and insists that competition has flourished during the period in which it has controlled a quarter of the relevant market. To the contrary, the record suggests that both franchisors and concessionaires have been foreclosed from competition in the relevant market. It is difficult to see how Sportservice's pattern of capturing lengthy concession franchises (many of them in the lucrative major league baseball market) has promoted competition in the concession franchise market. The magnitude of Sportservice's concession franchise contracts, coupled with their considerable length, have had the opposite effect: they have locked up a large portion of the concession franchise market for many years, placing a significant amount of potential concession business beyond the grasp of any competitors. This much both district courts recognized.

The district court below also disputed Sportservice's proffered justifications for the length of the contracts. The evidence indicates that the length of the contracts is not necessary to recapture investments made in the contracts, *see* 365 F.Supp. at 250. Also, the district court could find no justification for the manner in which Sportservice used the follow-the-franchise clauses. The district court concluded that the "frequent use [of follow-the-franchise clauses] by Sportservice in tandem with long contract terms has served to bind many teams and facilities that were not primary parties to such transactions." Suffice it to say that the record is virtually silent as to any procompetitive effects of Sportservice's conduct with respect to these concession contracts.

Sportservice cites to *American Motor Inns v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), asserting that the district court did not properly follow the rule of reason. Sportservice apparently argues that a restraint of trade under the circumstances of this case should not be judged under the "least restrictive alternative" test, *see Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955, 92 S.Ct. 1172, 31 L.Ed.2d 232 (1972), but under the less burdensome "fairly necessary under the circumstances" test as directed in *American Motor Inns, supra.* We need not decide which of the tests should apply here, or even whether this court recognizes the difference, since the evidence in this case does not even show that the contract terms were fairly necessary under the circumstances; they were unreasonably long and unreasonably restrictive in preventing franchisors from dealing with other concessionaires and in preventing other concessionaires from dealing with the franchisors party to the agreements.

Finally, Sportservice argues that it should not suffer for contracts which are common in the industry. There is insufficient evidence in the record to verify Sportservice's claim here (it can only point to four such contracts of competitors with terms that approximate the prevailing term of Sportservice's contracts), and even if there were such evidence, an industry-wide practice would not justify what has clearly been shown to be unjustifiably anticompetitive. We therefore find no problem with the district court's adherence to and application of the rule of reason in making its determination below.

b. Conflict with Franchise Contract Law

As further evidence of the district court's noncompliance with the rule of reason, Sportservice contends that the district court's finding of a section 1 liability puts the Sherman Act into "novel" conflict with the law of franchises. In particular, Sportservice directs our attention to a trend in the law of franchises where courts have upheld long-term franchise agreements in the face of terminations or non-renewals of agree-

ments by franchisors.[10] Throughout its brief, Sportservice maintains that it is no different from the typical franchisee of the many fast food franchises operating in this country,[11] and apparently would have us believe that affirming the district court's finding of section 1 liability would seriously impair the contracting abilities of some of the major fast food franchisors by restricting franchise contract length. This novel argument concerning the "novel" conflict with the law of franchises does not impress us.

First, we fail to see the analogy between a major national entertainment events concessionaire like Sportservice and the typical small businessman who owns the exclusive right to use a fast food trademark under a franchise agreement with a major national franchisor. The typical franchised fast food operation

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[10] Sportservice cites *Shell Oil v. Marinello*, 120 N.J.Super. 357, 294 A.2d 253 (1972), *aff'd*, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed.2d 475 (1974) (action involving interpretation of a lease and a dealer agreement entered into between major oil company and one of its service station operators, and a determination of the extent of the oil company's right to terminate the lease and agreement with only ten days' notice), and *Atlantic Richfield v. Razumic*, 480 Pa. 366, 390 A.2d 736 (1978) (action by service station operator against oil company seeking to void contract provision providing for termination at will); and *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 446 U.S. 918, 100 S.Ct. 1852, 64 L.Ed.2d 272 (1980) (action by service station dealer against oil company alleging, *inter alia*, that oil company breached its fiduciary duty owed to dealer by terminating lease without good cause). The public policy thrust of each of these decisions is stated aptly in *Marinello:*

> "Viewing the combined lease and franchise . . . , it becomes apparent that Shell is the dominant party and that the relationship lacks equality in the respective bargaining positions of the parties."

307 A.2d at 601. Sportservice transforms the holdings of these contract cases into an argument that would support the length of its concession franchise agreements. These cases are not only inapposite in subject matter and policy considerations, they are also totally irrelevant to the consideration of the anticompetitive effects of lengthy contracts under the circumstances of this case.

[11] At one point in its brief, Sportservice contends that it does "nothing more or less than acquire a franchise to sell fast food items at a particular location" not unlike "McDonald's, Kentucky Fried Chicken, Pizza Hut, Taco Bell, Burger King, Dairy Queen and others." As discussed in the body of this opinion, this purported analogy exists, if at all, only superficially.

bears little resemblance to Sportservice's operations in either product line or competitive market conditions. While the fast food franchisee competes in an open market among many operators (including intra-brand competitors) who sell items for which there exists recognized cross-elasticity of demand for many different types of food products, Sportservice's operations, by comparison, constitute monopolies for the sale of a limited menu of items of its choosing to a closed, contained market with no sales competition from others (either inter- or intra-brand). Although the exclusive nature of Sportservice's right to sell concession items at a particular event or facility is not the subject of the antitrust inquiry in this case,[12] the monopolistic feature of a typical Sportservice concession franchise and others included in the relevant market in this case cannot be ignored in defining differences between Sportservice and the franchisees it seeks to be associated with in its argument here.

Even were we to accept Sportservice's proffered analogy, the policies promoted in the state law cases cited by Sportservice for the proposition that courts are protecting the length of franchise agreements do not apply to Sportservice. The equitable policies expressed in the cases cited which protect small business franchisees against contract termination by large franchising companies simply do not transfer to the facts of this case. If there were any disparity in bargaining power between Sportservice and its franchisors in the relevant market, the record indicates that Sportservice, as franchisee, most often possessed the superior bargaining position.

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[12] The district court below noted that the exclusivity, *per se*, of the concession franchise agreements was not at issue and that the parties agreed that the exclusive arrangement is the only practical way to conduct the business of concession sales at the events and facilities involved. We will adhere to this stipulation of sorts and only add that we make no judgment as to the propriety of the exclusive nature of the franchise agreements. We do sense a certain irony about this, however. While our decision here may promote competition in the concession franchise market, the unchallenged pragmatic monopolies created by these exclusive agreements will probably prevent this decision from having much effect upon the price of the spectator's next hot dog.

Moreover, Sportservice once again overemphasizes the district court's conclusion of unnecessary contract length in the Sportservice franchise agreements with its argument that courts are protecting franchise contract length. We reiterate that the district court below considered a number of factors in finding a section 1 violation in this litigation. As evidence that Sportservice's anticompetitive conduct was unreasonable, the district court also focused upon the suspect use of Sportservice's vast financial resources and the customary inclusion of follow-the-franchise provisions in its agreements. Contract length is but one of many considerations figuring into the district court's conclusion. We are inclined, as was the district court, to avoid a concentration only upon the unreasonable length of Sportservice's contracts.

Finally, no party in the franchise law cases cited by Sportservice raised any claim that the amassing of a number of franchises foreclosed competition in a relevant market as Finley raises in the present litigation. In order for the Sportservice's franchise law cases to be even remotely analogous to the facts of this case, those cases would have to involve claims that a particular defendant owned or controlled such a large number of lengthy franchises in a relevant market that such defendant threatened to restrain competition in violation of antitrust law. The cases cited by Sportservice focus instead upon the narrow issue of whether one particular franchise agreement should be terminated with cause or otherwise. Based on the foregoing, we emphatically reject any notion that our affirmance of the district court's conclusion of section 1 liability will disturb present agreements or impair prospective dealings between fast food franchisees and franchisors.

4. Factual Findings

Sportservice asserts that certain findings of fact made by Judge Peckham regarding the section 1 violation were either

erroneous or unsupported by the record.[13] The record contains sufficient support for the findings, and we are bound to uphold them unless clearly erroneous. Fed.R.Civ.P. 52(a); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1351 (9th Cir. 1982).

Sportservice first attacks the district court's finding that without significant exception, Sportservice's exclusive concession franchise contracts run for 10 years or more. This is a

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[13] Sportservice takes issue with six findings of fact that were made by Judge Peckham in his application of the rule of reason as suggested in *Standard Stations, supra*, 337 U.S. at 308, 69 S.Ct. at 1059, 93 L.Ed. at 1383, which involves an inquiry into the degree to which "competition has flourished" despite the anticompetitive restraints of the contracts at issue, "the conformity of the length of their term to the reasonable requirements of the field of commerce in which they were used," "the status of the defendant as a struggling newcomer or an established competitor," and, most importantly, the "defendant's degree of market control. . . ." *Id.*

Also, Judge Peckham's analysis was performed with the use of the evidence entered before Justice Clark, together with evidence from the post-remand proceedings. Judge Peckham discussed his stance regarding the viability of the fact findings made during the first trial by Justice Clark:

> "The parties are in dispute as to what findings of Justice Clark remain viable and effective after the Ninth Circuit's reversal of his relevant market and consequent liability holdings. We are of the opinion that specific findings of fact concerning the histories of this and other Sportservice baseball contracts, 365 F.Supp. at 245-49, and conclusions of law concerning the reasonableness of these contracts, 365 F.Supp. at 249-51, remain intact. In any case, we do not base our holdings on his findings, for we have reviewed the record and we are in complete agreement with his factual findings and his conclusion that these contract terms are unreasonably long."

Memorandum and Order of December 29, 1978, at 18, n2.

The dispute over the viability of the pre-remand factual findings made by Justice Clark has not been carried to this appeal. Thus, it is not necessary for us to determine whether the pre-remand findings automatically survive under the circumstances of this litigation. Besides, Judge Peckham performed an independent review of the pre-remand record and noted his "complete agreement." Accordingly, for purposes of evaluating whether particular findings are clearly erroneous, the complete record—both pre- and post-remand—are available to us for evaluation. Finally, many of Justice Clark's factual findings involve Sportservice's concession contracts with major league baseball teams that remain as a significant number of Sportservice's aggregate share of the expanded relevant market. The continued relevancy of such findings is therefore obvious.

frivolous contention as the evidence clearly supports Judge Peckham's finding on this matter.

Second, Sportservice asserts that there is some contradiction in the district court's findings that the lengths of Sportservice's contracts do not vary in relation to the size of initial investment and that the experience of other concessionaires proves that adequate recoupment of investment may be made over much shorter periods. There is nothing inherently contradictory about the two findings, both are supported by the evidence, and neither can be considered clearly erroneous. Nor do we feel, as Sportservice suggests, that our affirmance will dictate that concession franchise contract length cannot exceed ten years. Such a conclusion is once again a simplistic view of the district court's ruling. The district court did not set out to announce an upper limit to franchise contract length and the effect of its ruling does not accomplish that purpose. The district court did hold, and we affirm, that Sportservice's pattern of conduct in the relevant concession franchise market imposed anticompetitive restraints. As previously discussed, our decision as it relates to Sportservice's conduct does not impose any general constraints upon the formation or enforcement of franchise agreements,[14] and it certainly does not establish that under all circumstances a concession franchise agreement with a term exceeding ten years is automatically a violation of the Sherman Act.

Third, Sportservice takes issue with the district court's conclusion that almost no other concession contracts in the relevant market run for more than ten years. For this finding, Judge Peckham referenced two exhibits representing concession industry profiles that were admitted into evidence. These industrial surveys, assuming their accuracy, more than adequately support the conclusion that concession contracts for greater than ten years' duration are rare. Of those that do exceed ten years, the largest number are controlled by Sportservice. Sportservice asserts that the average contract length of various concession operations "in or near" the relevant market

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[14] *See* section III.B.3.b. of this opinion, *supra*.

"substantially exceed 10 years." The record sources cited by Judge Peckham contradict this assertion, and without benefit of record sources for Sportservice's averages, we cannot find Judge Peckham's conclusion to be clearly erroneous.

Finally, Sportservice contests Judge Peckham's rejection of Sportservice's explanation that clubs and sellers of concession franchises had actively sought long contract terms. Judge Peckham concluded that this proffered justification was without support in the record. Sportservice contends that the clubs and franchisors would often dictate the terms. To the contrary, the record shows that in many instances the long-term contracts were procured by Sportservice's cash payment loans or other financial inducements, and that without these financial inducements, the contract terms are comparatively short. Justice Clark also rejected this justification argument concerning Sportservice's baseball concessions and noted:

> "Where the Clubs seek enormous sums of money by way of advances, loans, et cetera, they know that such financial arrangements require long terms. However, the record shows the Clubs do not want long terms. Absent the loans, advances, et cetera, all of the terms are comparatively short."

365 F.Supp. at 250. As mentioned, Judge Peckham was in complete agreement with Justice Clark's findings, and these findings relating to Sportservice's baseball concessions provided Judge Peckham with a legitimate source of evidence in which to assess Sportservice's conduct in the reassessed, post-remand market.

Having reviewed the record in regard to the challenged findings, we are not left with a definite and firm conviction that a mistake has been committed. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948), and *Arrington v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 651 F.2d 615, 619 (9th Cir. 1981).

C. Attempted Monopoly, Sherman Act Section 2 Violation

A section 2 attempt to monopolize claim requires proof of three elements: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1962); *Portland Retail, etc. v. Kaiser Foundation, etc.*, 662 F.2d 641, 647 (9th Cir. 1981). In numerous cases, this court has noted that while the three elements are discrete, they are often interdependent; i.e., proof of one of the three elements may provide circumstantial evidence or permissible inferences of the other elements. For example, in *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978), we held that "proof of predatory or anticompetitive conduct which can serve as the basis for a substantial claim of restraint of trade will, in some circumstances, permit an inference of specific intent and then, in turn, of dangerous probability." *Id.* at 854. Thus, an attempted monopoly violation can be found with evidence of conduct alone. Where this analysis is used, our most recent pronouncements indicate that all three elements may be proved with evidence of conduct that is either: (1) conduct forming the basis for a substantial claim of restraint of trade, or (2) conduct that is clearly threatening to competition or clearly exclusionary. *Inglis, supra*, 668 F.2d at 1029 n.11; *Portland Retail, supra*, 662 F.2d at 648.

The district court below found that the evidence proved not only a substantial restraint of trade (the section 1 violation), but also was clearly threatening to competition and clearly exclusionary. The district court elaborated:

> "Sportservice's use of excessively long contract terms in its purchases of concession rights has completely excluded competitors from those portions of commerce. This practice has established Sportservice as the leading power in this market, and, if enforced, it promises to preserve that impregnable competitive position for years to come. This

> conduct clearly supports an inference of a specific intent to destroy competition, and, in turn, an inference of a dangerous probability of success under *Janich Brothers.*"

Excerpt of Record at 80.

As further evidence of Sportservice's specific intent to monopolize, the district court's additional comments deserve repeating:

> "Sportservice's inclusion of follow-the-franchise clauses in its long-term contracts served to ensnare additional teams and facilities and so to multiply its concession franchise holdings. But perhaps the most blatant indication of Sportservice's intention is its repeated use of lavish loans, advances, and cash payments specifically to secure long-term contracts and contract extensions. While such financial arrangements do not amount to independently illegal restraints, Sportservice's unabashed willingness to enter into and its frequent involvement in such cash-for-long-term-commitment deals is further evidence of its intent to monopolize."

Excerpt of Record at 81.

Our review of the record finds sufficient evidence to support the district court's findings regarding Sportservice's conduct. We are therefore satisfied that Sportservice's conduct, as evidenced by this record, was sufficient for a conclusion that such conduct formed the basis for a substantial restraint of trade, was clearly exclusionary, and clearly threatening to competition in the relevant concession-franchise market. It was thus conduct sufficient in itself to provide proof of all three elements of a section 2 attempted monopoly violation, *Janich Brothers, supra; Inglis, supra.* We therefore affirm the district court's ruling that Sportservice violated section 2 of the Sherman Act, 15 U.S.C. §2.

IV. CROSS-APPEAL ISSUES

A. Post-Judgment Interest

Judge Peckham awarded Finley damages in the amount of $282,168 (which was trebled) by adopting the same figure as calculated by Justice Clark in 1972.[15] *See,* 365 F.Supp. at 255. Judge Peckham then granted interest on the damages commencing from the date of the entry of the post-remand judgment, July 31, 1979. Finley appeals from this interest award, maintaining that interest should run from the date of the first judgment, or, in the alternative, he seeks an inflation factor.[16]

Finley argues that since the damages awarded in the 1972 and 1979 judgments are identical, post-judgment interest should be calculated from the date of the entry of the first judgment because the reversal of the first judgment was of no ultimate significance due to the subsequent entry of an identical post-remand judgment. Finley relies primarily upon *Mt. Hood Stages v. Greyhound Corp.,* 555 F.2d 687 (9th Cir. 1977) (*Mt. Hood I); cert. denied in part,* 434 U.S. 1008, 98 S.Ct. 716, 54 L.Ed.2d 750 (1978), *vacated and remanded on other grounds,* 437 U.S. 322, 98 S.Ct. 2370, 57 L.Ed.2d 239 (1978); *remanded to district court,* 583 F.2d 469 (9th Cir. 1978) (*Mt. Hood II*); 616 F.2d 394 (9th Cir.) (*Mt. Hood III*), *cert. denied,* 449 U.S. 831, 101 S.Ct. 99, 66 L.Ed.2d 36 (1980), where this court granted interest from the date of a judgment which had been vacated by the United States Supreme Court, but where the district court entered a post-remand judgment with identical damages figures.

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[15] These damages represent "the difference between what [Finley] would have received had there been no illegal restraints and what [Finley] actually received under the 1950 contract [with Sportservice]." *See,* 365 F.Supp. at 255. The damages are for the four-year period from 1964 to 1967.

[16] Since we find for Finley on the interest issue, is unnecessary to discuss Finley's arguments regarding the application of inflation factors.

Finley also requests, in the alternative, that interest run at least from the date of the order establishing Sportservice's liability, December 29, 1978. Our decision, requiring interest to be calculated from the date of the entry of the first judgment, covers this requested period without reaching the merits of Finley's arguments that 28 U.S.C. §1961 requires application of interest to periods between pronouncement of liability and entry of judgment.

Sportservice argues that we should view Judge Peckham's limited interest award as a correct exercise of discretion, reversible only if we find an abuse thereof. Sportservice also attempts to distinguish *Mt. Hood, supra,* arguing that interest in *Mt. Hood* was applied from the first judgment only because the plaintiff in that case had presented the prevailing theory to the district court "in the first place." This argument would have us view the instant case as different because the damages awarded in the second judgment in this case were granted on an "entirely different basis." Interest, Sportservice argues, can only accrue from the date of the second judgment as liability was not clearly established until then.

As a preliminary matter, we recognize that an award of pre-judgment interest in a case under federal law is a matter left to the sound discretion of the trial court. *United States v. Cal. St. Bd. of Equalization,* 650 F.2d 1127 (9th Cir. 1981); *Wessel v. Buhler,* 437 F.2d 279 (9th Cir. 1971). However, our standard of review is not limited to deciding whether the district court abused its discretion in limiting the interest award because the issue before us here is whether mandatory post-judgment interest applied from the date of the first judgment is dictated by the application of 28 U.S.C. § 1961 to the facts of this case. Section 1961 provides in pertinent part:

"Interest shall be allowed on any money judgment in a civil case recovered in a district court .... Such interest shall be calculated from the date of the entry of the judgment, ..."

Id. In this case, the issue is whether the language "date of the entry of the judgment" means the first judgment entered by Justice Clark in 1972 or the post-remand judgment entered by Judge Peckham.

Both parties make extensive references to *Mt. Hood,* both in support of and against Finley's request for interest to be applied to the date of the first judgment in this case, and the district court below carefully attempted to distinguish *Mt. Hood* from the instant case. Of the cases directed to this issue, we must agree that *Mt. Hood* is controlling. Our study of *Mt. Hood* forces us to agree with Finley that *Mt. Hood* requires reversal because we read it to be founded on 28 U.S.C. § 1961 and

because the procedural contexts of this case and *Mt. Hood* do not significantly differ.[17]

As indicated by the lengthy citation above, *Mt. Hood* appeared before this court three times. The ultimate outcome in that case found Greyhound liable to Mt. Hood for treble damages from Greyhound's Sherman Act violations. The issue that precipitated the multiple appellate court record involved the interpretation of 15 U.S.C. § 15b, the four-year statute of limitations applicable to private antitrust actions. In support of its damages claims for the relevant period at issue, Mt. Hood originally argued that under 15 U.S.C. § 16(i), the statute of limitations had been tolled by the United States' intervention in administrative proceedings initiated by Mt. Hood before the Interstate Commerce Commission ("Commission").[18] After the district court trial, but prior to the first appeal, Mt. Hood added an alternative theory—equitable tolling—for Mt. Hood's initiation of and participation in the Commission hearings. This theory was also advanced on appeal before this court and the United States Supreme Court.

In *Mt. Hood I*, this court affirmed the district court's decision that section 16(i) tolled the limitations period, but the Supreme Court reversed and vacated the judgment, 437 U.S. 322, 98 S.Ct. 2370, 57 L.Ed.2d 239 (1978), both appellate courts reserving judgment on the second theory of equitable tolling. Subsequent to the Supreme Court's vacation and remand to this court, we in turn remanded to the district court for additional findings regarding the equitable tolling theory, *Mt. Hood II, supra*. It was after this remand that the district court received new evidence and entered a judgment of damages in the same amount as it had entered earlier with liability based on the alternative theory. Greyhound appealed; we again affirmed, *Mt. Hood III, supra;* and the Supreme Court

[17] The transactions which gave rise to Mt. Hood's claims against Greyhound are discussed at *Mt. Hood I, supra*, and are not relevant to our inquiry here.

[18] The Commission proceedings had been initiated pursuant to section 5(9) of the Interstate Commerce Act, 49 U.S.C. §5(9), and involved issues with the same transactions involved in the antitrust litigation: *See Mt. Hood I*, 555 F.2d at 689-90.

denied certiorari. 449 U.S. 831, 101 S.Ct. 99, 66 L.Ed.2d 36 (1980).

Although *Mt. Hood* did not involve a retrial of issues on remand, the district court did allow the parties to introduce new evidence supplementing the record on the equitable tolling issue. It was on the basis of the documents previously submitted after trial and this additional evidence that the district court ultimately determined the equitable tolling issue in Mt. Hood's favor. Greyhound's liability, thus, was not established until the second judgment was entered.

It can be seen, then, that the procedural transactions in the instant case mirror those which occurred in *Mt. Hood.* In both cases, the issue of antitrust liability was not firmly settled until the post-remand judgments, both of which were entered after additional factual inquiry. In both cases, it can be said that the second judgment "remains the same—in the same amount, for the same damages incurred during the same period." *Mt. Hood III, supra,* 616 F.2d at 407.

Judge Peckham concluded that "Mount Hood is best understood as a discretionary award of interest rather than a case espousing the principal [sic] of mandatory post-judgment interest." Excerpt of Record at 105—06.[19] We do not under-

[19] In fairness to Judge Peckham, it is not clear from his March 31, 1980 Memorandum and Order whether he had the benefit of this court's most recent pronouncement in *Mt. Hood III, supra,* where this court discussed the interest issue in light of 28 U.S.C. §1961. *See* 616 F.2d 406-07.

Our decision here would be no less compelled if *Mt. Hood* were read in the manner suggested by Judge Peckham because the equities attaching to Finley and Mt. Hood are similiar. Judge Peckham's limited interest award emphasized the fact that Finley was responsible for the delay in obtaining its second judgment from its actions in asserting what was determined to be an erroneous relevant market. Even if we could accept that responsibility for delay is a proper standard for district courts to use in granting or denying post-judgment interest (and we decline to do so here), appellant in *Mt. Hood* bore the same responsibility for asserting an erroneous position on appeal. The appellant in *Mt. Hood* did raise the prevailing theory after trial and in the appellate courts, but also vigorously asserted on appeal what was determined by the Supreme Court to be an erroneous theory. We see no significant differences between this case and *Mt. Hood* that would counsel us not to follow its precedent of granting post-judgment interest to the prevailing party commencing on the date of the first jugment.

stand *Mt. Hood III* to involve a discretionary application of interest; we find the decision allowing interest from the date of the original vacated judgment to be based upon an application of the mandatory post-judgment interest as required under 28 U.S.C. § 1961.

We therefore vacate that portion of the district court's judgment which limited interest to a period starting from the date of the entry of the post-remand judgment, and remand with instructions to recalculate the appropriate amount of post-judgment interest consistant with this opinion.

B. Attorney's Fees

Finley does not contest Judge Peckham's award of attorney's fees of $249,957.13 and costs of $5,833.57 for the post-remand period from June 26, 1975 through April 11, 1979. As unchallenged, these fees stand.

Finley does contest Judge Peckham's limitation of fees for the first trial, post-trial and appellate work. For the time spent by Finley's counsel for the period extending from the inception of this litigation through September 16, 1972, Justice Clark awarded a total of $257,182.30 in fees and costs. After the remand, Judge Peckham, feeling compelled to limit the first trial fee award since it related to time spent asserting an incorrect relevant market, reduced that fee in half and awarded $128,591.15. Judge Peckham then determined that a reasonable fee for post-trial time spent by Finley's counsel finalizing the first judgment and applying for attorney's fees was $6,780.00, but again reduced that award in half to $3,390.00 for the same reasons. As for the first appeal, Judge Peckham found a reasonable fee in the amount of $42,687.50, but awarded only ten percent, or $4,268.75, because Finley prevailed only on a statute of limitations question, suffering the reversal on all other questions. Finley feels entitled to all reasonable fees for the relevant time periods, arguing that all time spent was undertaken reasonably in an effort to obtain a successful recovery of antitrust damages. We agree with Finley.

Section 4 of the Clayton Act, 15 U.S.C. § 15, allows a successful treble damage plaintiff to recover reasonable at-

torney's fees as costs. An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory, *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529 (3d Cir.), *cert. denied*, 429 U.S. 825, 97 S.Ct. 78, 50 L.Ed.2d 87 (1976), and the purpose of the attorney's fees provision is to insulate treble damage recovery from expenditures for legal fees, consistent with section 4's purpose to encourage private persons to undertake enforcement of antitrust laws. *Perkins v. Standard Oil Co.*, 474 F.2d 549 (9th Cir. 1973), *cert. denied*, 412 U.S. 940, 93 S.Ct. 2778, 37 L.Ed.2d 400, *amended on other grounds*, 9th Cir. 487 F.2d 672.

The amount of attorney's fees allowed in connection with an award of damages in an antitrust suit is within the discretion of the trial court, reasonably exercised, and will not be disturbed absent an abuse of discretion or clear error of law. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964). For the reasons expressed below, we conclude that Judge Peckham erred in his application of the case law in denying Finley attorney's fees for all work reasonably performed in pursuit of a successful recovery of antitrust damages.

Judge Peckham reduced the fee award because he was "of the opinion that time spent in the pursuit of unsuccessful claims should not be compensated as part of Finley's reasonable attorneys' fees in this matter," citing *Wall Products Co. v. National Gypsum Co.*, 367 F.Supp. 972 (N.D.Cal.1973). Sportservice supports Judge Peckham's limitation citing to additional authority for the proposition that time spent prosecuting unsuccessful claims should not be considered in awarding attorney's fees under section 4 of the Clayton Act. For this proposition, Sportservice cites *FLM Collision Parts, Inc. v. Ford Motor Co.*, 411 F. Supp. 627 *modified on other grounds*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097, 97 S.Ct. 1116, 51 L.Ed.2d 545 (1977); *Vandervelde v. Put & Call Brokers & Dealers Association*, 344 F.Supp. 157 (S.D.N.Y.1972); *Kane v. Martin Paint Stores, Inc.*, 439 F.Supp. 1054 (S.D.N.Y.1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978); *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208 (3d Cir. 1978); and *Beech Cinema v. Twentieth Century*

Fox Film Corp., 480 F.Supp. 1195 (S.D.N.Y.1979), *aff'd*, 2nd Cir. 622 F.2d 1106 (1980).

We think Sportservice and the district court below have misread the above cases. Our reading of the above-cited authority reveals that the cases are descendants of *Decorative Stone Co. v. Building Trades Council*, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594, 48 S.Ct. 530, 72 L.Ed. 1005 (1928), a case in which a prevailing antitrust plaintiff, who had received damages and an injunction against the defendant, requested attorney's fees, and was denied fees for work attributed to the equitable relief because "[t]he allowance of an attorney's fee, as authorized by section 4 [of the Clayton Act], is incidental to the statutory right to damages, and was properly denied in the equity proceedings."

Decorative Stone, supra, 23 F.2d at 428. The rule originating from *Decorative Stone* has been applied to deny fees to plaintiffs who asserted "factually unsupportable claims," *Vandervelde, supra*, 344 F.Supp. at 161, and *Wall Products Co. v. National Gypsum Co.*, 367 F.Supp. 972 (N.D. Cal. 1973); and to deny fees related to work that was duplicative or related solely to claims or activities unrelated to the successful recovery of antitrust damages. *See FLM, supra*, and *Kane, supra*.

A closer look into the rule's historical underpinnings and the later cases reveals the district court's error. The cases clearly state that although "[t]ime devoted exclusively to prosecuting unsuccessful claims is not compensable," *Beech Cinema v. Twentieth Century Fox Film Corp.*, 480 F.Supp. 1195, 1197 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 1106 (2d Cir. 1980) (citing *Kane, supra*, and *FLM, supra*), the cases also add that "to the extent that the time was applicable to both successful and unsuccessful claims, it is properly includible." *Id.*

In the present case, Judge Peckham reduced Finley's fees by one-half for time spent prosecuting the first trial, and denied all but 10 percent of Finley's fees for time spent prosecuting the first appeal, stating that the reduction was justified because "time spent in the pursuit of . . .unsuccessful claims should not be compensated." Characterizing Finley's prosecution of the

first trial and first appeal as an assertion of unsuccessful claims proves too much. As we understand the rule generated from *Decorative Stone* and more recently applied in *Beech Cinema*, a plaintiff is to receive compensation in fees for work which is related to the pursuit of both successful and unsuccessful antitrust claims. In the instant case, Judge Peckham concentrated on Finley's unsuccessful efforts in persuading this court to affirm its success at the first trial. Our review of the record finds no evidence that Finley's time was devoted exclusively to the promotion of unsuccessful claims. That Finley asserted what was deemed to be an erroneous relevant market and two antitrust theories that were rejected on appeal does not mean that Finley's attorney's work product was devoted to duplicative efforts or to the pursuit of damages not properly compensable under section 4 of the Clayton Act. As we view this case, all of Finley's efforts in pursuit of antitrust damages against Sportservice were properly pursued toward the successful recovery of a single claim for relief; i.e., damages for Sportservice's anticompetitive conduct. Finley obtained relief for its injuries by prevailing under the theories we affirm in this opinion. At no time did Finley request relief other than that for which it now can claim a damages judgment.

Moreover, we believe that a prevailing antitrust plaintiff is entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit of a successful recovery of anti-trust damages. *See Pitchford Scientific Inst. Corp. v. Pepsi, Inc.*, 440 F.Supp. 1175 (W.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 242 (1979).

The fees granted by Justice Clark for Finley's work during the first trial were adjudged reasonable by Justice Clark at that time. The parties, in effect, stipulated, and Judge Peckham apparently agreed, that the dollar figures arrived at by Justice Clark for the time spent on the first trial were reasonable. However, Judge Peckham, in an admittedly crude manner, reduced the fee award granted by Justice Clark in half because

of Finley's unsuccessful assertion of a narrow relevant market. Judge Peckham did not suggest that Finley's advocacy was other than what a reasonable and prudent attorney would perform in advancing or protecting his client's interest in the successful pursuit of antitrust damages. Thus, to the extent Judge Peckham reduced Finley's attorney's fee awards otherwise adjudged to be reasonable, he erred in his application of relevant case law.

We do not think that *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982), is contrary. In that case, a panel of this court followed *Sethy v. Alameda Cty. Water Dist.*, 602 F.2d 894 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 731, and held that although Oregon state inmate plaintiffs were only partially successful in obtaining the relief they sought from the defendants' administration of the Oregon correctional facilities, they still could be considered as prevailing parties for purposes of applying 42 U.S.C. § 1988. *Citing Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978) (*Nadeau II*), this court in *Bartholomew* stated:

> "[p]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. However, the amount of attorney's fees they receive should be based on the work performed on the issues in which they were successful."

665 F.2d at 914. The *Bartholomew* court then remanded the attorney's fee issue for a determination "of the amount of time spent by [plaintiffs'] counsel on the prevailing issues." *Id.* at 915. *Bartholomew* could be read to support Judge Peckham's limitation of attorney's fees in the instant case as he considered the relevant market issue, as litigated by Finley at the first trial and rejected on first appeal, to be an unsuccessfully asserted issue. July 23, 1979 Memorandum and Order at 7, ER at 91-92. However, for the reasons expressed below, we do not believe that *Bartholomew* is applicable to the instant case.

First, there should not be automatic transference of rulings interpreting 42 U.S.C. § 1988 to cases involving the application

of the attorney's fees provision under 15 U.S.C. § 15. While the statutes promote similar policies and purposes, *cf. Seattle School Dist. No. 1 v. State of Wash.*, 633 F.2d 1338 (9th Cir. 1980), *probable jurisdiction noted,* ____U.S.____, 102 S.Ct. 384, 70 L.Ed.2d 204 (1981) (purpose in providing attorney's fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law) with *Perkins v. Standard Oil Co., supra,* (purpose of attorney's fees provision of section 4 of the Clayton Act, 15 U.S.C. § 15, is to award the successful plaintiff a reasonable attorney's fee so that his treble damage recovery would not be unduly diminished by the payment to his attorneys and further encourage antitrust law enforcement), the two statutes vary in scope. Section 1988 provides for recovery of attorney's fees for section 1988 plaintiffs who may claim damages or who may claim declaratory and injunctive relief. Section 4 of the Clayton Act, 15 U.S.C. § 15, on the other hand, is more limited; attorney's fees under § 15 are incidental to the statutory right to damages and are properly denied in equity proceedings. *Decorative Stone, supra.* This incidence or relationship to antritrust damages recovered also solves the problem of determining who is the prevailing party in an antitrust treble damages suit.

Second, and perhaps more importantly, *Bartholomew* followed the prevailing issues rule as stated in *Sethy, supra,* and *Sethy* followed the rule as initially announced by the First Circuit in *Nadeau II, supra.* The critical word in the *Nadeau* prevailing issues rule is "issues." By taking a closer look at the factual circumstances of the *Bartholomew, Sethy* and *Nadeau* cases, it becomes apparent that the courts in those cases used the word "issues" more in the sense of "claims for relief" rather than broadly intending the prevailing issues rule to preclude attorney's fees recovery for work spent on every unsuccessfully asserted factual or legal issue arising in a case.

In *Nadeau,* the plaintiff inmates claimed that a number of restrictions placed upon them under protective custody at the New Hampshire State Prison Annex violated the First, Sixth, Eight and Fourteenth Amendments. *Nadeau v. Helgemoe,* 423

F.Supp. 1250, 1260 (D.N.H.1976). The district court ordered relief in many forms such as added safety precautions for the transportation of protective custody inmates; improved living conditions; improved mealtime conditions; increased access to shower, exercise facilities, and library, etc. *Id.* at 1274-75. On appeal, the First Circuit reversed all of the district court order save the portion ordering increased access to library facilities. *Nadeau v. Helgemos*, 561 F.2d 411 (1st Cir. 1977) (*Nadeau I*); (*see also* confirmation of the result after the first appeal in *Nadeau v. Helgemos*, 581 F.2d 275 (1st Cir. 1978) (*Nadeau II*). The above-quoted rule regarding attorney's fees was announced in *Nadeau II*, 581 F.2d at 278-79; and that court applied it as to the prevailing library access issue as follows:

> "We think it is clear that the library access *issue* was significant enough a victory for plaintiffs to be considered prevailing parties. For their work on that *issue* they 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unuust.' "

Id. (Citations omitted, emphasis added).

While the court in *Nadeau II* referred to the library access "issue" in the above quote, it is apparent that the reference is to a successfully asserted claim for relief—increased library access. The plaintiff inmates prevailed on the library access claim, receiving the only relief sought as to that claim—an injunction granted greater access to the prison's library facilities. The prevailing "issue," then in *Nadeau* was not an issue of disputed facts, nor of disputed evidentiary rulings, nor even of disputed legal theories. The prevailing "issue" was a successfully litigated claim for injunctive relief. Had the claim for increased library access been the only claim brought by the inmates, there would have been no quesiton that the inmates were prevailing parties within the meaning of 42 U.S.C. § 1988.

A similar reading emerges from a look at the *Bartholomew* case. The prevailing issue rule as applied in *Bartholomew* can also be read to mean that under 42 U.S.C. § 1988, a plaintiff who prevails on some claims for relief may collect an attorney's fee award for work spent on litigation of those successful

claims. Although, as in *Nadeau*, the word "issues" is used in *Bartholomew* instead of "claim for relief," the factual circumstances in *Bartholomew* are sufficiently similar to those in *Nadeau* to indicate that the rule should apply to exclude fees only for work performed on unsuccessfully asserted claims for relief. Reviewing the district court opinion in *Bartholomew*, it is clear that the prisoners sought separate declaratory and injunctive relief from a number of separately alleged constitutional violations resulting from factually distinct actions of the defendants. *See Bartholomew v. Reed*, 477 F.Supp 223 (D.Or. 1979). The plaintiff inmates ultimately prevailed on only four claims. *Id.* at 233. Although this court in *Bartholomew v. Watson* noted the "State inmates argue quite persuasively that only one constitutional challenge was presented in the complaint, . . . ," 665 F.2d 914-915, the court did not so hold; and, apart from any determination as to the number of "challenges" brought, we do not think it reasonable to view *Bartholomew* as involving only one claim for relief. Approximately eleven separate claims for relief were requested in *Bartholomew*, the plaintiffs prevailing on four.

Sethy, supra, is consistent with the above interpretation of the word "issues." In *Sethy*, this court first adopted the *Nadeau* rule in a case in which a prevailing plaintiff was only partially successful. While bringing claims against a public water district and a number of individual defendants under both 42 U.S.C. §§ 1981 and 1983, Sethy received a jury verdict as against the water district only and only on the § 1981 claim. This court considered the § 1981 claim against the water district to be "one of the most significant *issues* in litigation," 602 F.2d at 898, yet it is apparent from the facts of the case that the reference to the significant issue is a reference to Sethy's claim for relief against the water district under § 1981.

Bartholomew, *Sethy*, and *Nadeau* apply to partially successful § 1983 plaintiffs. As an antitrust treble damages plaintiff, Finley has always sought only one claim for relief—damages for antitrust violations. Finley is not a partially successful plaintiff. Although once unsuccessful on the relevant market issue, and ultimately on the asserted theories of mono-

poly and tying, Finley's successful recovery of antitrust damages indicates that Finley was totally successful on the only claim for relief he ever sought.

We simply cannot read the word "issues" in *Bartholomew* and *Sethy* so literally to mean that a successful treble damages plaintiff is to be denied attorney's fees for time spent on all unsucessfully litigated issues. To do so would mean that the district court would be required to exclude time devoted to unsuccessfully asserted evidentiary issues, to unsuccessfully asserted versions of disputed facts, and to other seemingly innumerable types of factual or legal issues which a prevailing plaintiff may lose in the course of a successfully litigated damages award. It may be that in the context of § 1983 litigation involving constitutional challenges to prison confinement conditions, that the word "issues" is particularly relevant for purposes of applying § 1988; it could also be that the original choice of the word in *Nadeau* was an unfortunate one. Be that as it may, a literal application of the prevailing issues rule in the context of applying section 4 of the Clayton Act would lead to absurd results; results that, in our mind, would also lead to an incorrect application of the philosophy of full recovery of attorney's fees for successful treble damages plaintiffs.

As mentioned, for purposes of applying the attorney's fees provision of section 4 of the Clayton Act, 15 U.S.C. § 15, time devoted to a request for injunctive relief may be excluded, *Decorative Stone, supra;* time exclusively devoted to factually unsupportable claims may be excluded, *Vandervelde, supra,* and *Wall Products, supra;* and time devoted to work which is duplicative or related solely to claims or activities unrelated to the successful recovery of antitrust damages may be excluded. *FLM, supra,* and *Kane, supra.* Judge Peckham found none of the above. Instead, he focused upon the time consumed in the instant litigation relating to the reversal of Finley's first asserted relevant market. Certainly, the relevent market was a critical issue in this case, and it cannot be disputed that Finley lost round one on that issue. But, we have found no cases, including *Bartholomew v. Watson,* which would support a limitation upon

Finley's attorney's fee award in the circumstances of this case, and we feel it is inadvisable to create such a rule here.

We believe that in order to advance the purpose of the attorney's fees provision of section 4 of the Clayton Act, Finley is entitled to all reasonable fees generated at every stage of this litigation: first trial, appeal, and post-remand work. To deny Finley reasonable attorney's fees for time spent at all these stages would discourage private plaintiffs from vigorously prosecuting antitrust claims. Accordingly, the district court's award of attorney's fees is vacated and we remand with instructions for the district court to enter an award of attorney's fees and costs in the following manner:

(1) For the period from the initiation of the litigation through September 16, 1972, fees and costs in an amount of $257,182.30 (original figure as determined by Justice Clark);

(2) From September 17, 1972 through April 4, 1973 (time spent finalizing the first judgment and applying for attorney's fees), an amount of $6,780.00 (Judge Peckham's determination of a reasonable fee without reduction);

(3) For time spent on prior appeal for the period from May 16, 1973 through February 27, 1975, an amount of $42,687.50 (determined to be reasonable by Judge Peckham per the July 23, 1979 Memorandum and Order);

(4) For the period from June 26, 1975 through April 11, 1979, an amount of $249,957.13 and costs in the amount of $5,833.57.

Interest shall be applied to the above figures from the date of the entry of the judgment in which each fee award was entered pursuant to the dictates of section IV.A. of this opinion.

Costs on appeal are awarded to Finley. On the remand, the district court shall entertain a motion by Finley to fix attorney's fees on this appeal and shall conduct such proceedings as may be necessary to make a reasonable award.

V. CONCLUSION

We affirm the district court's determinations that Sport-service violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. We reverse the district court's limitations of interest and attorney's fees.

AFFIRMED in part; REVERSED and REMANDED in part.

APPENDIX B

DISTRICT COURT MEMORANDUM AND ORDER,

DECEMBER 29, 1978

Appendix B

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civ. No. 48234 RFP

TWIN CITY SPORTSERVICE, INC.,
a Missouri corporation,
Plaintiff,

v.

CHARLES O. FINLEY & COMPANY, INC.,
an Illinois corporation,
Defendant.

CHARLES O. FINLEY & COMPANY, INC.,
an Illinois corporation,
Counterclaimant,

v.

TWIN CITY SPORTSERVICE, INC.,
a Missouri corporation; and
SPORTSERVICE CORPORATION,
a New York corporation,
Counterdefendants.

MEMORANDUM AND ORDER

The facts and lengthy prior history of this action were summarized in this court's memorandum and order of March 31, 1977. This lawsuit began in 1967 when Twin City Sportservice, Inc. (Twin City) filed suit against Charles O. Finley & Company, Inc. (Finley), seeking relief from Finley's

alleged breach of its concession contract with Twin City. Finley counterclaimed against both Twin City and its parent corporation, Sportservice Corporation (Sportservice), alleging that the contract violated sections 1 and 2 of the Sherman Act. The contractual issues have long been decided in favor of Twin City and Sportservice. However, the antitrust defense and counterclaim remain to be resolved, and are now before the court on remand from the Ninth Circuit.

The origins of this dispute have been repeatedly described in the prior opinions rendered in the litigation. *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd*, 512 F.2d 1264 (9th Cir. 1975). To summarize briefly, in 1950 the Philadelphia Athletics baseball team entered into a contract with Sportservice's predecessor corporation (hereafter Sportservice) which granted Sportservice an exclusive franchise to act as concessionaire at Shibe Park, the Athletics' home stadium. After several subsequent adjustments and renegotiations the term of the contract was extended to 33 years. When the Athletics moved to Kansas City, Sportservice became the concessionaire in Kansas City pursuant to a "follow-the-franchise" clause in the contract. Finley acquired the Athletics in 1961, and moved the team to Oakland after the 1967 baseball season. Sportservice again sought to continue as the concessionaire pursuant to the follow-the-franchise clause, but Finley refused to honor the contract and the present litigation followed.

The contractual and antitrust issues were bifurcated for trial before Justice Clark. In 1970 Justice Clark determined that Finley had understood before its purchase of the Athletics that the concession contract would follow the franchise, or, in any event, that Finley had subsequently ratified such an understanding. Consequently, the court held that unless Finley prevailed on its antitrust defense and counterclaim, Finley was liable for contract damages in the amount of $1,165,400. Those holdings stand today.

After the second trial, the court found for Finley on the antitrust issues. Justice Clark determined, and the parties agree today, that the relevant geographic market in which to evaluate Sportservice's conduct and economic power is national. Justice Clark also decided that the relevant product market was the sale of concession services by concessionaires to major league baseball teams. On that basis he found: (1) that Sportservice was guilty of both attempted and actual monopolization; (2) that the concession contract was an unreasonable restraint of trade; and (3) that Sportservice had committed a *per se* violation of the Sherman Act by tying contracts for its concession services to the extension of loans to baseball teams.

The Ninth Circuit reversed Justice Clark's determination of the relevant product market:

> . . . [T]he trial court erred in treating Sportservice as a seller of concession services to major league baseball teams. Such services are sold to spectators who directly and immediately pay therefor—not to the major league baseball teams. The relationship between the major league baseball team or stadium owner and the concessionaire is one in which a franchise is sold by the ball team or stadium owner to the purchasing concessionaire. The market in which the franchise is sold is the franchise market—a market quite distinct from the concession products market. It follows that the relevant market with which we are concerned here is one in which the articles of commerce are franchises, not concession services. . . .
>
> We must hold therefore that the district court erred in its designation of the relevant market. We do not believe, however, that the present record permits us to fix the relevant franchise market.

Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1272 (9th Cir. 1975). Consequently, the court reversed each of Justice Clark's findings of antitrust liability and remanded the case for redetermination of the relevant product market.

Our memorandum and order of March 31, 1977 defined the franchise market and Sportservice's representation within that market as follows:

	Total	Sportservice
Stadia with major league baseball or football	24	11
Stadia with only major league football	9	1
Arenas with major league hockey and/or basketball	31	6
Arenas with no major league sports	27	4
Auto racing tracks	9	0
Amusement parks	54	0
	154	22

Attributing double weight to major league baseball franchises due to their greater gross revenues, the court determined that Sportservice's share of this market was at least 19 percent. We further held that a 19 percent market share could not support a finding of liability on the actual monopolization claim. We determined that Finley's tying claim was no longer viable after the Ninth Circuit's recharacterization of the transactions in issue as sales of concession franchises, rather than purchases of concession services, by sports teams and facilities. *See* 512 F.2d at 1276. Thus the only two remaining antitrust claims awaiting final adjudication are (1) that the contract that Sportservice seeks by this action to enforce is an unreasonable restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. §1; and (2) that Sportservice is guilty of attempted monopolization in violation of section 2 of the Sherman Act, 15 U.S.C. §2. For the reasons discussed below, we conclude that Sportservice is liable on both of these claims.

The Ninth Circuit's reorientation of the definition of the relevant market raises a problem concerning what substantive rules of law are applicable to this action. Justice Clark viewed Sportservice as a seller of concession services in the concession service market, but the Ninth Circuit saw Sportservice as a purchaser of concession franchises in the franchise market.

Hence Finley's claims must be characterized as alleging monopsony, rather than monopoly tendencies. The initial question before this court is whether the usual body of monopoly law under the first two sections of the Sherman Act applies to all. The Ninth Circuit made no mention of this issue, and seems to have assumed the continued applicability of traditional antitrust law concepts, as have the parties. Finley argues that the proper focus of this case is the exclusive dealing contract between the parties and its terms in the context of Sportservice's history and business practices, so that buyer and seller labels are not important. Clearly the Sherman Act applies to anticompetitive practices by purchasers of goods and services. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Buyers may not "stifle competition by denying competitors less favorably situated access to the market." *United States v. Griffith*, 334 U.S. 100, 108 (1948). Bearing in mind the purposes and policies of the antitrust laws, we conclude that traditional antitrust case law concerning monopolies and restraints of trade by sellers, with appropriate minor adjustments for the buyer-seller role reversal, provides useful and relevant guidance for considering the allegations of potential monopsony raised in this case.

RESTRAINT OF TRADE

The parties as well as the Ninth Circuit have analyzed this case as an "exclusive dealing" arrangement: the concession franchise contract grants to the concessionaire the exclusive right to sell concession items at the facility involved. The parties further agree that this is the only feasible way to do business—the operating costs are such that one facility could not support two or more competing concessionaires at the same time. Nor could one facility realistically have two concessionaires even for different sports in different seasons, absent special arrangements, because of the substantial investment required for the installation of concession stands and equipment. The disagreement in this case concerns the reasonableness or commercial necessity of the specific terms of the

exclusive concession contract, specifically its length and the "follow the franchise" clause.

Most reported cases that deal with exclusive dealing arrangements discuss the problem only in the context of whether they violate section 3 of the Clayton Act, 15 U.S.C. § 14. The three leading Supreme Court decisions on this topic fall in this category—*Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922), *Standard Oil Co. v. United States (Standard Stations)*, 337 U.S. 293 (1949), and *Tampa Electric Co. V. Nashville Coal Co.*, 365 U.S. 320 (1961). Nevertheless, the Ninth Circuit stated, "These parties appear to agree that . . . [the *Tampa Electric*] test provides an appropriate guide." 512 F.2d at 1275. That court went on to note that "a greater showing of anti-competitive effect is required to establish a Sherman Act violation than a § 3 Clayton Act violation in exclusive dealing or requirements contracts cases." *Id.* Hence mindful of this adjustment, we will look to decisions under section 3 of the Clayton Act for the relevant standard.

Tampa Electric states that we must determine (1) what the relevant market is, and (2) whether the competition foreclosed constitutes a substantial share of the relevant market. Substantiality is to be determined by weighing the probable effect of the restraint on the relevant area of effective competition, taking into account the relative strengths of the parties, the market share preempted, and the present and future effects of preemption on competition. 365 U.S. at 327-29. *Standard Stations* held that an exclusive dealings restraint that foreclosed competition in a 6.7 percent share of the relevant market was sufficient to meet this test. *Tampa Electric*, on the other hand, held that a long-term requirements contract preempting a market share of less than one percent was insufficient to establish a violation in the context of the peculiar market and facts of that case.

We have previously determined that Sportservice's market share is at least 19 percent. Sportservice contends, however, that the proper market share figure to consider in determining the substantiality of the competition foreclosed must be limited to that share directly affected by the Sportservice-Athletics

contract. It argues that the specific contract involved in this action involves well under one percent of the market, and thus is not a sufficiently substantial restraint to violate the Sherman Act. Sportservice claims that the government as a plaintiff in an antitrust suit can aggregate the entirety of a defendant's contracts to prove a restraint of trade, but a private plaintiff can refer only to the contracts in which it participated and which allegedly caused its injury. Sportservice cites no authority for this restrictive approach, and we cannot agree. We are of the opinion that a private plaintiff, in attempting to prove a restraint of trade claim, should be able to look beyond a defendant's direct dealings with the plaintiff and beyond the practices that impact directly on the plaintiff. A defendant's general practices and patterns of dealings, of which the conduct or contract that caused plaintiff's injury is a part, and the defendant's position in and overall share of the relevant market are entirely appropriate and relevant items for the court's consideration.

Private antitrust case law is consistent with this conclusion. The Supreme Court in *Standard Fashion* upheld a retailer's challenge to his exclusionary contract with a dress pattern manufacturer, finding that the agreement, "interpreted in light of the circumstances surrounding the making of it, was within the provisions of the Clayton Act as one which substantially lessened competition and tended to create monopoly." Specifically the Court emphasized that the circumstances surrounding the contract there in issue included the manufacturer control of 40 percent of the pattern agencies in the country through similar exclusive dealings contracts. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922). *Tampa Electric* involved a single requirements contract that was found not to violate the Clayton Act, largely because it was *not* part of a series of similar contracts. The Court noted, "There is here neither a seller with a dominant position in the market as in *Standard Fashion* . . . nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in [*Standard Stations*] . . . ." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 334 (1961). Other courts have looked to aggregate market shares in similar

private party litigation. *See, e.g., Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, at 831 (9th Cir. 1971), *cert denied*, 404 U.S. 1049 (1972); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, at 467-68 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *cf. Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, at 502 (1969) (involving tying contracts); *American Motor Inns v. Holiday Inns, Inc.*, 521 F.2d 1230, at 1250-52 (3d Cir. 1975); *Curly's Dairy Inc. v. Dairy Cooperative Association*, 202 F. Supp. 481 (D. Ore. 1962).

To adopt Sportservice's reasoning would serve to immunize from private prosecution an exclusive dealing monopolist (or monopsonist) who was guilty of gross restraints of trade, but whose clearly substantial aggregate market share was the sum of many small, individually insubstantial contracts with different parties. Clearly the public plaintiff may look to aggregate market shares, so this proposed distinction is inconsistent with the well-established judicial and legislative policy of favoring private antitrust enforcement. *See e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, at 262 (1972); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, at 502 (1969). Moreover, judicial enforcement of this and like contracts would make this court party to the larger illegal restraints of trade of which such individual contracts are otherwise inactionable parts.

Sportservice further argues that the law of this case as determined by the Ninth Circuit also mandates our considering only the instant contract in determining the relevant market share foreclosed. In its remand the Ninth Circuit stated that it was "necessary to establish the proper relevant market before it can be determined whether a *particular* exclusive-dealing *arrangement* unreasonably restrained competition in a substantial share of that market." 512 F.2d at 1274-75 (emphasis added). Sportservice emphasizes the word "particular" in the statement to argue that we should look only to this contract. Finley points to "arrangement" to indicate that the overall course of conduct of the defendants in obtaining and enforcing similar contracts is the proper focus of our deliberations. We conclude that the use of the word "arangement" would more

likely indicate that we are to look not only to this contract, but to other similar contracts as well. This also comports with logic and sound policy.

The 19 percent market share that we have previously ascribed to Sportservice is, however, not necessarily the proper figure to use in determining the substantiality of Sportservice's restraint of trade. We must determine whether that market share in fact consists of long-term contracts similar to the Athletics contract, and whether, taken together, these contracts foreclose competition in a substantial portion of the relevant market. We answer both questions in the affirmative. Without significant exception, Sportservice's exclusive concession franchise contracts run for 10 years or more.[1] Furthermore, the

FOOTNOTES FOR APPENDIX B

[1] The terms of other Sportservice contracts that make up it share of the relevant market (*see* the tabulation of its market share, *supra* at 4) are as follows:

Jarry Park (Montreal)	25 years
White Sox Park (Chicago)	10 years
Baltimore Memorial Stadium	24 years
Busch Stadium (St. Louis)	30 years
Forbes Field (Pittsburgh)	"at least 25 years"; potententially renewable at Sportservice's option for up to 100 years
Milwaukee County Stadium	25 years
Municipal Stadium (Cleveland)	10 years (a previous agreement was perpetually renewable by Sportservice for as long as the Cleveland baseball club occupied that stadium)
Robert F. Kennedy Stadium (Washington, D.C.)	10 years
Riverfront Stadium (Cincinnati)	25 years
Tiger Stadium (Detroit)	15 years
Cincinnati Gardens	15 years (but by 1970 that agreement had remained in effect for at least 21 years)
Cleveland Arena	30 years
Milwaukee Arena	5 years (that contract was preceded by two consecutive 10-year contracts)
Buffalo Memorial Auditorium	20 years

(*footnote continues*)

preemption of 19 percent of a market by means of exclusive dealings contracts has a substantial effect on competition simply by virtue of the magnitude of such a share. But the effect is particularly devastating to competition when that market share is controlled by the leading competitor in the field through the use of long-term contracts that completely lock out other competitors from that portion of the market for years to come. *Cf. Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, at 329 (1961). We conclude that the anti-competitive effect of these contracts exceeds not only the threshold for Clayton Act violations prescribed in *Tampa Electric*, but also the stricter Sherman Act standard set out by the Ninth Circuit in its remand of the instant case. *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, at 1275 (9th Cir. 1975).

Given Finley's showing that Sportservice's contracts have the requisite anti-competitive effect, we must next decide whether these long contracts terms are nevertheless justifiable

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(*footnote continued*)

Chicago Stadium	Year to year—effective for 31 consecutive years by 1970
St. Louis Arena	20 years
Kansas City Municipal Auditorium	5 years (preceded by consecutive 4 and 5-year contracts)
Omaha Municipal Auditorium	15 years; renewed for 5 more years in 1970
Providence Arena	30 years

See plaintiff's exhibits Nos. 549-51, 606, 717 (Section III); defendant's exhibits Nos. 1005, 1009, 1016, 1035, 1040, 1048, 1060, 1065, 1068, 1079, 1085B, 1086A, 1095; Finley's Brief Following Market Findings, at 13. (Compare Justice Clark's discussion of Sportservice baseball contracts, 365 F. Supp. at 245-49).

Information concerning the Sportservice contracts with the Buffalo Civic Stadium and the Ak-Sar-Ben Coliseum (Omaha) is not available. Even eliminating these franchises from consideration and thereby reducing Sportservice's market share to 17 percent does not alter our conclusion—Sportservice has preempted a clearly substantial share of the relevant market through its use of long-term contracts.

or "reasonable."[2] Some factors useful in making this determination are set out in *Standard Stations.* They include the degree to which "competition has flourished" despite the restraints, "the conformity of the length of their term to the reasonable requirements of the field of commerce in which they were used," the "status of the defendant as a struggling newcomer or an established competitor, and, most importantly, the defendant's degree of market control, for the greater the dominance of his position, the stronger the inference that an important factor in attaining and maintaining that position has been the use of . . . [the challenged] contracts to stifle competition rather than to serve legitimate economic needs." 337 U.S. at 308 (citations omitted).

Sportservice is without doubt an established competitor and the dominant force in the relevant concessions market. It has been in the business for over 50 years, and now holds at least a 19 percent share of the market, including, as of 1970, 11 of 24 major league baseball franchises, which are acknowledged to be the most lucrative and the most important concessions contracts in terms of access to and leverage over other team, event, and facility franchises.[3] Only nine other national concessionaires compete with Sportservice in this market.[4]

As for the long terms (ten or more years) of this and almost all of Sportservice's contracts, the record shows that business necessities in the concession industry simply do not justify them. The lengths of the contracts do not vary in

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[2] The parties are in dispute as to what findings of Justice Clark remain viable and effective after the Ninth Circuit's reversal of his relevant market and consequent liability holdings. We are of the opinion that specific findings of fact concerning the histories of this and other Sportservice baseball contracts, 365 F. Supp. at 245-49, and conclusions of law concerning the reasonableness of these contracts, 365 F. Supp at 249-51, remain intact. In any case, we do not base our holdings on his findings, for we have reviewed the record, and we are in complete agreement with his factual findings and his conclusion that these contract terms are unreasonably long.

[3] *See, e.g.,* Finley's Post-Trial Brief, at 37-49, and citations to exhibits and transcript included therein; plaintiff's exhibit No. 305-2.

[4] *See* plaintiff's exhibit No. 840.

relation to the size of the initial investments.[5] The experience of other concessionaires shows that adequate recoupment can be made over much shorter periods,[6] and almost no other concessions contracts in this market run for more than ten years.[7] Indeed, Sportservice itself once took a contract for a single year.[8] As for the Athletics contract, the loan and cash payment made by Sportservice were paid off and amortized well before this litigation began, and long before the 33-year term of the contract is due to expire.[9] Sportservice's explanation that the clubs and sellers of the concession franchises had actively sought these long contract terms is also without support in the record. Absent the loans and advances, contract terms in this field are comparatively short.[10]

The essential harm caused by Sportservice's excessive long exclusive dealings contracts is their complete and total foreclosure of competition in the portions of the market they cover. Other courts have struck down under the Sherman Act families of contracts of significantly shorter duration than those in issue here. *See, e.g., United States v. Standard Oil Co.*, 362 F. Supp. 1331, at 1341 (N.D. Cal. 1972), *aff'd*, 411 U.S. 924 (1973) (5-10 years); *United States v. American Can Co.*, 87 F. Supp. 18 (N.D. Cal 1949) (5 years). Moreover, such contracts have produced frequent extensions of the initially long terms, thereby eliminating further competition. *Cf.* E. Kintner, *An Antitrust Primer*, at 48 (2d ed. 1973). Although the Ninth Circuit has stated that the follow-the-franchise clause is not an independent illegal restraint of trade, 512 F.2d 1275, its frequent use by

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[5] *See, e.g.*, plaintiff's exhibit No. 609 and other exhibits cited in footnote 1, *supra;* 365 F. Supp. at 245-49.

[6] Compare the contracts described at 365 F. Supp. at 250.

[7] *See* plaintiff's exhibits No. 717, at Section III, and No. 718, at 32.

[8] Plaintiff's exhibit No. 321. It is notable that this short-term contract was entered into by Sportservice with the assurance that it could *not* be extended; this further undermines Sportservice's contention that long contract terms are essential to their operations. See Finley's Brief Following Market Findings, at 84-85.

[9] Plaintiff's exhibit No. 41; Transcript, at 1046. *See also* Finley's Brief Following Market Findings, at 25.

[10] *See, e.g.*, plaintiff's exhibits No. 717, at Section III, and No. 718, at 32.

Sportservice in tandem with long contract terms has served to bind many teams and facilities that were not primary parties to such transactions. This has multiplied Sportservice's power and market holdings, and has foreclosed competition still further.[11]

We conclude that these long-term contracts terms are economically unjustified. They represent classic examples of artificially created barriers to effective entry into and competition within the market. Therefore, having considered the entire family of Sportservice contracts, the court holds that Sportservice's practice of using excessively long contract terms in its purchases of exclusive concession rights to major league sporting events and spectator facilities constitutes an unreasonable restraint of trade that has foreclosed competition in a substantial share of the relevant market. As such, this practice violates Section 1 of the Sherman Act, 15 U.S.C. § 1. Against the background of these contracts and as a part of this pattern, the instant Sportservice-Athletics contract, whose 33-year term is also unjustified and similarly unreasonable, cannot be enforced by this court.

ATTEMPT TO MONOPOLIZE

A recent case succinctly summarizes the present status of the law in the Ninth Circuit on attempts to monopolize under the Sherman Act. In *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), the court enunciated three elements necessary to a plaintiff's prima facie case: (1) a "specific intent to control prices or destroy competition with respect to a part of commerce;" (2) "predatory conduct directed to accomplishing the unlawful purpose;" and (3) a

[11] For example, the original Athletics contract gave Sportservice concession rights for the Phillies baseball team and the Eagles football team in Philadelphia, and later, when the Athletics moved to Kansas City, for Kansas City Municipal Stadium and the Chiefs football team. Its contract with the St. Louis Browns baseball team eventually entangled the St. Louis Cardinals baseball team (who later assigned to Sportservice for 30 years, the concession rights at the Cardinals' new stadium), and Baltimore Municipal Stadium and the Baltimore Colts football team when the Browns moved east. *See* Finley's Brief Following Market Findings, at 18-22, and exhibits cited therein.

"dangerous probability of success." 570 F.2d at 853 (citing *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 12-13 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974); *Moore v. James H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1973); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972); *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1344 (9th Cir. 1970); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert denied*, 377 U.S. 993 (1964)). The court went on to explain that several "short-cut" methods of proving these elements have been recognized in this circuit:

> [A] dangerous probability of success (element 3) does not necessarily require direct proof of market power such that the defendant's actions, if unchecked, would result in actual monopoly. While direct proof of market power is one means of establishing this element, it is not always essential. . . . We have held that the trier-of-fact may infer dangerous probability of success from proof of specific intent to control prices or destroy competition in a portion of the market without legitimate business purpose (element 1), accompanied by predatory conduct toward that end (element 2).
>
> . . . In some cases we have also held that the trier-of-fact may infer the first element, specific intent, from proof of the second, predatory or anti-competitive conduct, directed to accomplishing the unlawful purpose . . . so long as this conduct can serve as the basis for a substantial claim of restraint of trade. . . . Thus . . . proof of predatory or anti-competitive conduct which can serve as the basis for a substantial claim of restraint of trade will, in some circumstances, permit an inference of specific intent and then in turn of dangerous probability.

570 F.2d 853-54 (citations omitted). The court further explains:

> If this approach is used by the trial court, it should be remembered that the intent which may be inferred from conduct will depend upon the circumstances in which the

> conduct occurs. For example, the same agressive conduct which is seen only as a reaction to competition by a small firm may suggest intent to monopolize where carried out by a firm with a significant market power. Where a plaintiff relies only upon a defendant's conduct to establish an attempted monopolization claim and does not show market power, specific intent to monopolize should ordinarily be inferred only where the alleged conduct is of a kind clearly threatening to competition or clearly exclusionary.

570 F.2d at 854 n.4.

We find that Sportservice's actions constitute exactly this type of conduct—threatening to competition and unquestionably exclusionary. As set out above, Sportservice's use of excessively long contract terms in its purchases of concession rights has completely excluded competitors from those portions of commerce. This practice has established Sportservice as the leading power in this market, and, if enforced, it promises to preserve that impregnable competitive position for years to come. This conduct clearly supports an inference of a specific intent to destroy competition, and, in turn, an inference of a dangerous probability of success under *Janich Brothers*. *See also Gough v. Rossmoor Corp.*, 585 F.2d 381, at 389-90 (9th Cir. 1978); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, at 813-15 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

As the basis for a substantial claim of restraint of trade that violates section 1 of the Sherman Act, such conduct alone is a legally sufficient basis for a finding of section 2 liability. Nevertheless other conduct by Sportservice further reinforces our finding of a specific intent to monopolize. As described above, Sportservice's inclusion of follow-the-frachise clauses in its long-term contracts served to ensnare additional teams and facilities and so to multiply its concession franchise holdings. But perhaps the most blatant indication of Sportservice's intentions is its repeated use of lavish loans, advances, and cash payments specifically to secure long term contracts and contract

extensions.[12] While such financial arrangements do not amount to independently illegal restraints, Sportservice's unabashed willingness to enter into and its frequent involvement in such cash-for-long-term-commitment deals is further evidence of its intent to monopolize.

We are satisfied that Finley has established all elements of an attempt to monopolize. Consequently, we find Sportservice guilty of violating section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), and we find that the instant Sportservice-Athletics contract, as a product and further manifestation of Sportservice's unlawful attempt to monopolize commerce, is unenforceable.

DAMAGES

Not only is the 1950 Athletics contract unenforceable but Finley is entitled to recover its damages that were caused by Sportservice's violations of the federal antitrust laws. The measure of these damages is the difference between what Finley would have received had there been no illegal restraint and what it actually received under the 1950 contract.

Although the Ninth Circuit reversed Justice Clark's initial findings of liability in this case, it is our opinion that his computation of damages must stand. Using the amount guaranteed for baseball in Ogden's successful bid for the concession franchise at Kansas City Municipal Stadium following the Athletics departure in 1968, Justice Clark fixed damages

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[12] For a description of Sportservice's use of credit and cash in its procurement of baseball concessions contracts, *see* 365 F. Supp. at 245-49. (Again, we are of the opinion that the factual findings made by Justice Clark remain viable, but we have reviewed the record and are in complete agreement with these findings concerning the details and circumstances of Sportservice's baseball contracts. *See* note 2, *supra.*) *See, also* Finley's Brief Following Market Findings, at 58-120 and citations to exhibits and transcripts included therein.

Regarding similar transactions in connection with non-baseball contracts, *see* plaintiff's exhibit No. 609. *See also* plaintiff's exhibits Nos. 610-11; Finley's Brief Following Market Findings, at 120-23 and exhibits and transcripts cited therein.

at $282,168.00 for the four-year damage period 1964-67. 365 F. Supp. at 255. We adopt this figure. This amount will be trebled according to law. In addition Finley is entitled to reasonable attorney's fees, to be fixed by the court.

Counsel for Finley is directed to prepare a proposed judgment.

IT IS SO ORDERED.

/s/.....
United States District Judge

Dated: December 29, 1978

APPENDIX C

DISTRICT COURT MEMORANDUM AND ORDER, MARCH 31, 1977

Appendix C

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civ. No. 48234 RFP

TWIN CITY SPORTSERVICE, INC.,
a Missouri corporation,

Plaintiff,

v.

CHARLES O. FINLEY & COMPANY, INC.,
an Illinois corporation,

Defendant.

CHARLES O. FINLEY & COMPANY, INC.,
an Illinois corporation,

Counterclaimant,

v.

TWIN CITY SPORTSERVICE, INC.,
a Missouri corporation; and
SPORTSERVICE CORPORATION,
a New York corporation,

Counterdefendants.

MEMORANDUM AND ORDER

This extended lawsuit began in 1967 when Twin City Sportservice, Inc. (Twin City) filed suit against Charles O. Finley & Company, Inc. (Finley), seeking relief from Finley's alleged breach of its concession contract with Twin City. Finley counterclaimed against both Twin City and its parent corpo-

ration, Sportservice Corporation (Sportservice), alleging that the contract violated sections 1 and 2 of the Sherman Act. The contractual issues have long been decided in favor of Twin City and Sportservice. However, the antitrust defense and counterclaim remain to be resolved, and are now before the court on remand from the Ninth Circuit.

The origins of this dispute have been repeatedly described in the prior opinions rendered in the litigation. See *Twin City Sportservice v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd* 512 F.2d 1264 (9th Cir. 1975). To summarize briefly, in 1950 the Philadelphia Athletics baseball team entered a contract with Sportservice's predecessor corporation (hereafter Sportservice) which granted Sportservice an exclusive franchise to act as concessionaire at Shibe Park, the Athletic's home stadium. After several subsequent adjustments and renegotiations the term of the contract was extended to 33 years. When the Athletics moved to Kansas City, Sportservice became the concessionaire in Kansas City pursuant to a "follow-the-franchise" clause in the contract. Finley acquired the Athletics in 1961, and moved the team to Oakland after the 1967 baseball season. Sportservice again sought to continue as the concessionaire pursuant to the follow-the-franchise clause, but Finley refused to honor the contract and the present litigation followed.

The contractual and antitrust issues were bifurcated for trial before Justice Clark. In 1970 Justice Clark determined that Finley and Sportservice had had an understanding before Finley's purchase of the Athletics that the concession contract would follow the franchise, or in any event that Finley had subsequently ratified such an understanding. Consequently, the court held that unless Finley prevailed on its antitrust defense and counterclaim, Finley was liable for damages in the amount of $1,165,400. These holdings stand today.

After the second trial, the court found for Finley on the antitrust issues. Justice Clark determined, and the parties agree today, that the relevant geographic market in which to evaluate Sportservice's conduct and economic power is national. Justice Clark also decided that the relevant product market was the

sale of concession services by concessionaires to major league baseball teams. On that basis he found: (1) that Sportservice was guilty of both attempted and actual monopolization; (2) that the concession contract was an unreasonable restraint of trade; and (3) that Sportservice had committed a *per se* violation of the Sherman Act by tying contracts for its concession services to the extension of loans to baseball teams.

The Ninth Circuit reversed Justice Clark's determination of the relevant product market:

> . . . [T]he trial court erred in treating Sportservice as a seller of concession services to major league baseball teams. Such services are sold to spectators who directly and immediately pay therefor—not to the major league baseball teams. The relationship between the major league baseball team or stadium owner and the concessionaire is one in which a franchise is sold by the ball team or stadium owner to the purchasing concessionaire. The market in which the franchise is sold is the franchise market—a market quite distinct from the concession products market. It follows that the relevant market with which we are concerned here is one in which the articles of commerce are franchises, not concession services. . . .
>
> We must hold therefore that the district court erred in its designation of the relevant market. We do not believe, however, that the present record permits us to fix the relevant franchise market.

Twin City Sportservice v. Charles O. Finley, supra at 1272. Consequently, the court reversed each of Justice Clark's findings of antitrust liability, and remanded the case for redetermination of the product market. It is in dispute whether or not Justice Clark's findings of willfulness or specific intent to monopolize still remain intact.

I. THE NINTH CIRCUIT GUIDELINES

In its discussion of the general legal rules in drawing a product market, the Ninth Circuit emphasized the importance

of evaluating both substitutability of use and substitutability of supply:

> The proper point of departure in any discussion of the relevant product market must be the rule of "reasonable interchangeability," enunciated in *United States v. E. I. DuPont du Pont de Nemours & Co.*, 351 U.S. 377 . . . (1956). . . . That is, where there is a high degree of *substitutability in the use* of two commodities, it may be said that the cross-elasticity of demand between them is relatively high, and therefore the two should be considered in the same market.
>
> A like analysis applies when the market is viewed from the production rather than the consumption standpoint; the degree of substitutability of production is measured by cross-elasticity of supply. Substitutability of production refers to the ability of firms in a given line of commerce to turn their production facilities toward production of commodities in another line because of similarities in technology between them. Where the degree of substitutability of production is high, cross-elasticities of supply will also be high, and again the two commodities in question should be treated as part of the same market. [512 F.2d at 1271.]

The court then went on to offer "guides" for the application of these principles to the definition of the franchise market in the present case.

First, the court described how the substitutability of production in the concession products market serves to limit the substitutability of use in the franchise market:

> . . . The willingness of a concessionaire to bid for a concession franchise depends on his ability to move from selling concession items to spectators at one type of event or facility to those at the event or facility at which the franchise is offered. Only when his resources easily can be devoted to the concession products market for which the franchise is offered can the concessionaire make effective use of the franchise. Put in the technical terms of anti-trust

law, the cross-elasticity of supply in the concession products market limits the cross-elasticity of demand in the franchise market.

The evidence before the trial court suggests that there is a high degree of "substitutability of production." That is, the evidence was sufficient to support a finding that many aspects of the concession operations at the various facilities presenting leisure time events other than major league baseball are the same or similar enough to each other and to those existing at major league baseball parks to be considered substitutable or transferable.

Twin City Sportservice v. Charles O. Finley & Co., supra at 1273. The court noted that concessionaires often utilize the same equipment and employees at different types of events, and that stadium and ball club owners apparently do not regard previous baseball experience as essential in selecting their concessionaires.

Second, although the court did not feel that the record was adequate to permit numerical definition of the market, it provided a clear statement of the types of facilities which it considered to be within the range of production substitutability:

The relevant franchise market does not . . . embrace franchises offered in connection with leisure time activities that require the maintenance of a full kitchen. The requisite substitutability in production is lacking this instance. The franchise market with which the trial court should be concerned on remand of this case is that which envisions the sale by the concessionaire of a limited range of concession items to spectators in a closed area, either by vendors, stands, or both, where the preparation requires at most a grill and not a kitchen. The leisure time activities with respect to which franchises within the relevant market are available are undoubtedly numerous. They may include all or a substantial number of the following: *viz.*, football, basketball, hockey, soccer, boxing, racing, track and field, rodeos, circuses, and music festivals. Likewise the sellers of such franchises may include professional

> teams, sports organizations, and public and private operators of stadiums, arenas, race tracks, convention centers and amusement parks. [512 F.2d at 1274.]

It should be noted that this statement of the market boundaries occurs in the context of a discussion of substitutability of production. This court does not read this passage to require that the market include franchises for every facility, no matter how small, which is of a category found to be production substitutable. Rather, after determining what facilites are substitutable in terms of the technology of production, the court must then examine the structure of demand in the franchise market and exclude those facilities which are not in fact reasonably interchangeable in use.

Third, although Finley argues that major league baseball franchises alone still constitute a viable market, the Ninth Circuit's opinion precludes this court from accepting so narrow a market:

> . . . the relevant franchise market cannot be limited to those offered for sale by major league baseball teams. The mere fact that, as the court found, major league baseball, because of its long season, frequency of games, and pace of play, produces the highest total concession revenues and profits of all sports does not alter this conclusion. The major league baseball franchise is a coveted franchise for this reason and, as a consequence, commands a high price on the franchise market. There are, however, other leisure time activities that offer for sale other concession franchises for which there are bids by concessionaires capable of serving both that for which they bid as well as major league baseball.
>
> . . .
>
> Moreover, the scope of the relevant market is not governed by the presence of a price differential between competing products. In *du Pont*, for example, the Supreme Court included cellophane in the flexible wrapping market, along with glassine and greaseproof papers, its chief competitors, despite the fact that its cost was two or three times as great. [512 F.2d at 1274.]

Clearly major league baseball franchises stand at the center of the relevant market. However, the Ninth Circuit undoubtedly contemplated that other categories of facilities would also be included, at least in the absence of some dramatic new evidence at the second trial.

Finally, the Ninth Circuit commented on whether or not facilities which presently operate their own concessions are to be included within the product market:

> Even if we agreed with the trial court's basic premise, that the provision of concession services to major league baseball was the relevant market, its failure to include as participants in that market baseball clubs which supply their own concessions very likely would compel reversal on that ground. The considerations which, in the view of the trial court, make the opportunity to provide concession services to a major league baseball club a uniquely desirable and profitable one in the eyes of a professional concessionaire must also appeal to the stadium or team owner-cum-entrepreneur. Thus, the exclusion from the relevant market of baseball teams which run their own concessions opefations—a pro-competitive influence in that market—could not be supported even under the trial court's conceptualization. [512 F.2d at 1272n.]

The parties are in dispute over the significance of this passage. Finley argues that it would require the inclusion of self-operated facilities only if the court were to adopt Justice Clark's original approach, treating the market as a service rather than a franchise market. While the language of the footnote could support such a reading, the reasoning suggested by the passage implies that self-operating facilities must also be included when the market is analized in terms of the sale of franchises. Although obviously a self-operating facility is not actively seeking to sell a franchise to an outside concessionaire, presumably such facilities would turn to outside concessionaires whenever the conditions in the franchise market indicate that such action would be more profitable. In that sense franchises at self-operating facilities are more immediately available than franchises which have already been locked into extended

contracts. Accordingly, this court will include self-operating facilities within the market, if otherwise appropriate.

In sum, the task which emerges from these guidelines has two steps. First, the court must determine what facilities, considered in terms of the techniques and skills of their concession operations, are reasonably interchangeable with major league baseball franchises. This substitutability of production in the concession products market defines the outer limits of the franchise market. Second, the court must determine which franchises within these outer boundaries are found by national concessionaires to be reasonably interchangeable in use. Since the products at issue here are in a sense production inputs, such substitutability in use will be in large part a reflection of the profit potential available to a national concessionaire in operating at a given facility.

II. SUBSTITUTABILITY OF PRODUCTION IN THE CONCESSION PRODUCTS MARKET

As noted above, the court of appeals specified the test to be used in determining the boundaries of substitutability of production in the concession products market. This court is to look to franchises for "the sale . . . of a limited range of concession items to spectators in a closed area, either by vendors, stands or both, where the preparation requires at most a grill and not a kitchen." The Ninth Circuit suggested various facilities and activities which might meet these criteria, and Sportservice has raised other possibilities.

There is little doubt that substitutability of production obtains in the concession operations at all major league sports facilities, including stadiums where major league baseball and/or football is played, and arenas where major league basketball and/or hockey is played. Finley attempted to show that concession operations at major league baseball stadia are unique because of the scale of operations, the use of hawkers,

and the timing and frequency of the intermissions.[1] Even assuming that all these features are unique to baseball, this court is not convinced that they could possibly present great difficulties to a concessionaire skilled at other types of major league sports facilities. There also appears to be a substantial number of arenas which do not have major league basketball or hockey. Most of these arenas would not attract the interest of a national concessionaire; such problems of scale and profitability will be discussed in the next section. Here it need only be noted that such arenas would apparently meet the Ninth Circuit test for substitutability of production.

The evidence also indicates that automobile racing tracks and at least some amusement parks meet the terms of the Ninth Circuit test. Automobile racing concessions operations do involve the purveying of concession items to spectators within a closed area, and rarely if ever involve the use of a full kitchen. Certainly there are differences between concession operations at automobile racing and at major league sports events, such as the continuous nature of an automobile race and the exceptional importance of weather conditions in automobile racing. However, the court has determined that these differences are not great enough in themselves for automobile racing to be categorically excluded from the market, particularly since auto racing meets the express terms of the Ninth Circuit test.

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[1] Much of Finley's evidence on substitutability of production was apparently intended to prove that it is impractical to "shift" operations from a major league baseball stadium to facilities housing other types of events, i.e., abandon the stadium and move the same people and equipment into other facilities. This approach misconceives the problem. No one contemplates that substitutability of production in the concession products market involves uprooting and relocating entire, on-going operations. The question is whether operations at various types of facilities are sufficiently similar that a concessionaire operating at one type of facility will have the management skills to open a new operation in another type of facility, given adequate financing. Evidence that a concessionaire does actually shift personnel and equipment back and forth between different types of facilities suggests that the operations are similar. But the type of practical problems which would be involved in abandoning one facility and starting up immediately at a second facility are irrelevant.

Amusement parks are somewhat more problematic. They might not appear to involve "spectators," which is the term used in the Ninth Circuit test. However, the Ninth Circuit itself suggested amusement parks as a possible category for inclusion in the market. Presumably the court appeals did not mean its use of the word "spectators" to imply that only non-participatory activities could fall within the market. Also, there is some evidence suggesting that concession operations at many amusement parks involve the use of a full kitchen. However, there are apparently a substantial number of amusement parks utilizing "at most a grill and not a kitchen," and the evidence affords some basis for segregating them from the others. Accordingly at least some amusement parks can be considered within the zone of substitutability of production in the concession products market.

None of the other suggested categories of facilities and activities appear to fall within the zone of substitutability of production. Apparently many of these activities take place in the facilities which have already been considered above, and generally do not offer a separate and additional franchise for their concession operations. Boxing, soccer, rodeos, circuses, music festivals, and track and field events all share this trait. Some, such as fairs, most frequently employ a large number of specialized food vendors, and do not offer exclusive franchises of the type at issue in this litigation. Most importantly, horse racing, dog racing, and convention centers all must be excluded because the use of a kitchen for providing full dinners is an important part of their operations.

III. SUBSTITUTABILITY OF USE IN THE FRANCHISE MARKET

Examination of substitutability of production in the concession products market has defined the categories of facilities within which the relevant franchise market is to be drawn: stadiums with major league baseball and/or football, arenas with major league basketball and/or hockey, arenas without major league sports, auto racing tracks, and certain amusement parks. The problem at this point is to determine the number of facilities in each category which could in fact support the operations of a national concessionaire, and consequently, what

franchises are substitutable in use for national concessionaires. Sportservice argues correctly that since the market is essentially one for business opportunities, the crucial determinant is profitability. However, Sportservice then appears to conclude because profits might be available on an investment of any size, all facilities large and small within the above listed categories must be included within the relevant market. This conclusion is unwarranted. The maintenance of nationwide operations imposes overhead costs on national concessionaires which local concessionaires do not face. Before a national concessionaire may operate profitably at a given facility, the facility's scale of operations must be large enough to allow the national concessionaire's management expertise and efficiency to outweigh the added costs of national operations. Gauging substitutability of use in the franchise market involves primarily a determination of what facilities within the relevant categories have large enough concession operations to support national interest.

Much attention was devoted at trial to "satellite" or "courtesy" operations, that is, facilities which a concessionaire operates as an adjunct to a nearby larger operation, or as a favor to a large customer. Sportservice argues that since national concessionaires do operate at smaller facilities under these circumstances, such smaller facilities should be included in the market. However, it is a truism that a businessman may simultaneously operate in two or more markets. A national concessionaire, having established a base of operations in a given area, might then choose to enter the local franchise market. But the national franchise market includes only those facilities which are capable of attracting national concessionaires who do not have significant business ties to the area.

Little contention surrounds the substitutability of use within the first two categories, that is, stadia with major league baseball and/or football and arenas with major league basketball and/or hockey. It appears clear that the franchises within all these categories could be operated profitably by national concessionaires. The only serious dispute concerns the Montreal baseball franchise held by Sportservice. Sportservice

argues that because Montreal is not within the boundaries of the United States, the Montreal franchise is not in the "national" market endorsed by the Ninth Circuit. However, no one has attached such significance to the "national" market in the earlier phases of this litigation. Justice Clark included the Montreal contract in calculating the Sportservice market share, and the Ninth Circuit passed over that action without comment. Furthermore, it would be excessively artificial to exclude the Montreal ball club from the market in this action. While other types of Canadian recreational facilities may reasonably be excluded from the national market, the Montreal baseball team cannot logically be separated from baseball teams in the United States which stand at the very center of the market at issue here.

Arenas without major league sports present far greater difficulties. It has been determined that such facilities fall within the zone of substitutability of production, but the evidence leaves little doubt that the overwhelming majority of such facilities do not have concession operations on a scale adequate to qualify for inclusion within the market. Finley attempted to confront this problem with the testimony of Vincent Pantuso, an executive in the Volume Service Company. Within each of the categories of facilities within the market, Pantuso listed those facilities which he felt would be of interest to national concessionaires.[2] In constructing these lists, he testified that he used $250,000 in annual gross revenue or $25,000 in annual unit profits as the minimum scale of concession operations required for inclusion in the market. Mr. Pantuso explained that by "unit profits" he meant profits at the facility level, not taking into account overhead costs associated only with the nationwide organization. Using this approach he

[2] During cross-examination Sportservice's attorneys devoted much attention to whether Pantuso was presenting a list of business opportunities of interest to his company, or purporting to present a list of interest to all national concessionaires. The distinction holds little significance. If Pantuso's list constitutes a credible reflection of his own business objectives, then the inference would clearly follow that the list presents the objectives of other large national concessionaires.

listed some 27 arenas without major league sports.[3] Sportservice took strong exception to Pantuso's testimony, pointing out that since Volume Service presently conducts concession operations for the Oakland Athletics, Pantuso has a personal interest in the outcome of the litigation. However, Sportservice presented no concrete alternatives to Pantuso's minimum size criteria. As mentioned above, Sportservice apparently contends that all the facilities falling within the zone of substitutability of production for concession products should be included in the market. The court cannot accept such an unrealistic alternative. Furthermore, the use of $25,000 of annual unit profits as a minimum guideline hardly constitutes an improbable or unreasonable approach to measuring substitutability of use in the franchise market. Accordingly, the 27 arenas listed by Pantuso will be included in the market.

A parallel problem is involved in determining the scope of substitutability of use among franchises at auto racing facilities. While there are many hundreds of auto tracks in the United States, the overwhelming majority of them are tiny operations which could not possibly be utilized profitably by national concessionaires. Even at large, prestigious auto racing tracks the annual attendance rarely approaches that at major league sports facilities. Furthermore, the peculiar sensitivity of auto racing to poor weather conditions subjects the concessionaire to unique risks. Mr. Pantuso testified that in light of these problems, there were only nine auto racing facilities which would be of significant interest to national concessionaires.[4] As in the case of arenas without major league sports, the court is left with no viable option to Pantuso's lists.

Somewhat greater complexity attaches to the use of Pantuso's testimony concerning the final category of facilities, amusement parks. Mr. Pantuso presented a list of some 70 "funspots" which he felt would attract national concessionaires. He then designated those facilities which were only recently constructed, which involved the use of a full kitchen, or which are self-operating. Recently constructed facilities or facilities

[3] See Schedule IV in the appendix to Finley's post-trial brief, compiled from defendants' exhibit 1211.

[4] See Schedule VII of Finley's post-trial brief.

with full kitchen operations are appropriately excluded from the market, but as discussed above, the Ninth Circuit has indicated that self-operated facilities are to be included. Applying these standards, some 54 facilities from Pantuso's list would fall within the market.[5]

There are several categories of events and facilities which have not yet been discussed and which should be mentioned at this point. Although neither party has pursued the matter with particular vigor, there was some testimony at the trial concerning golf and tennis tournaments. It appears that although tennis tournaments might warrant inclusion in today's market, they are not a significant feature of the market during the years at issue in this suit. The evidence also indicates that golf tournaments present a series of unique problems, such as brief duration, extended preparation periods, and great weather risks. Although some national concessionaires have occasionally operated at golf tournaments, it appears their experiences were often unsatisfactory. In these circumstances golf tournaments cannot be considered reasonably interchangeable with the franchises in the core of the market. Finally, Sportservice has suggested that some 4,000 drive-in movie theaters be included in the market. It is not clear how seriously this suggestion is meant, since little evidence or argument is offered to support it. In any event it is clear that concession operations at all drive-in theaters are too small to be included in the market. Sportservice does operate at drive-in theaters, but only in limited geographical areas. This serves to confirm this court's conclusion that competition for drive-in theater concessions is restricted to local markets.

Apparently no controversy surrounds the number of franchises which Sportservice holds in each category within the market. The franchise market and Sportservice's representation within the market may be summarized as follows:

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[5] See defendants' exhibit 1214

	Total	Sportservice
Stadia with major league baseball or football	24	11
Stadia with only major league football	9	1
Arenas with major league hockey and/or basketball	31	6
Arenas with major league sports	27	4
Auto racing tracks	9	0
Amusement parks	54	0
	154	22

Sportservice's market share would be 14 percent if it were calculated simply as a percentage of the total number of franchises, giving equal weight to all franchises within the market. Such a calculation would not reflect the fact that franchises at major league sports facilities, particularly major league baseball, represent substantially larger business opportunities than other franchises in the market. Since most of Sportservice's franchises are at large major league sports facilities, the failure to weight franchises by annual gross revenues would understate Sportservice's actual market share. However, the record does not contain information on the annual gross revenues at each of the facilities within the market. The evidence does show that revenues at baseball franchises are on average twice that at any other major league sports franchise. Consequently, Finely argues, the weighting of the franchises should be approximated by giving double weight to the major league baseball franchises. Calculated in this manner, the Sportservice market share would be 19 percent. Undoubtedly such an approximation would still understate the Sportservice market share, since the average major league baseball franchise produces far more than twice the gross revenue of many of the other types of franchises in the market, such as auto racing tracks or amusement parks. But in attempting to apply the economic concepts of the antitrust laws in concrete situations, the courts must often rely on reasonable approximations. See e.g., *United States v. Philadelphia National Bank*, 374 U.S. 321, at 364n (1963), where the Supreme Court made an arbitrary downward adjustment to defendants' market share to reflect certain gaps in the government's proof of market. Accordingly,

the court determines that Sportservice's share of the relevant market in this case is 19 percent.

IV. SUBSTANTIVE LIABILITY

As the parties have both acknowledged, the Ninth Circuit's opinion disposes completely of Finley's tie-in claim:

> . . . the trial court characterized the advances made by Sportservice to the Athletics as the tying product and its concession services as the tied product and concluded that there was an appreciable restraint on free competition and that a not insubstantial amount of interstate commerce was affected.
>
> Our holding with respect to the relevant market dictates our disapproval of this conclusion of the trial court. We view Sportservice as a purchaser of a concession franchise from the Athletics, the seller, in exchange for payments consisting of (1) certain loans and advances and (2) a percentage of the gross receipts, payable throughout the life of the contract. Viewed in this manner, the *sin qua non* of a tying case, *viz.* two separate products, is lacking.

Twin City Sportservice v. Charles O. Finley & Co., supra, at 1276. In any event, the theory under which Justice Clark determined that Sportservice had market power in the tying product, i.e. credit, is no longer viable in light of the Supreme Court's recent opinion in *United States Steel v. Fortner Enterprises, Inc.*, Slip Op. (Feb. 22, 1977).

Three legal theories of antitrust liability remain in litigation:

(1) that Sportservice is guilty of actual monopolization in violation of section 1 of the Sherman Act;

(2) that Sportservice is guilty of attempted monopolization in violation of section 2 of the Sherman Act;

(3) that the contract which Sportservice seeks to enforce is an unreasonable restrain of trade in violation of section 1 of the Sherman Act.

This court's determination of Sportservice's share of the franchise market precludes any claim of actual monopolization. As the Ninth Circuit's cautionary language suggests, a 19 percent market share could not support a finding of liability under such a theory. See *Twin City Sportservice v. Charles O. Finley & Co.*, *supra* at 1274.

Liability under the remaining two theories is more problematic. At the final argument Finely requested the opportunity to submit additional briefing on liability after the court's determination of the market. Both the section 1 and section 2 claims involve elements which have not been briefed by Finley since the second trial. Furthermore, determination of these issues could involve extensive review of the record of the first trial, a process in which further briefing could be of great assistance. Accordingly, decision on these issues will be held in abeyance pending submission of additional briefing. Since the parties have in large part proceeded amicably in the conduct of the trial, it appears appropriate to allow them the opportunity to agree on a briefing schedule.

Dated: March 31, 1977

ROBERT F. PECKHAM

United States District Judge

APPENDIX D

NINTH CIRCUIT OPINION, FEBRUARY 21, 1975

Appendix D

United States Court of Appeals

NINTH CIRCUIT

Nos. 73-1126, 73-1585

TWIN CITY SPORTSERVICE, INC.,
a Missouri Corporation, and
SPORTSERVICE CORPORATION,
a New York Corporation, Appellants,

v.

CHARLES O. FINLEY & COMPANY,
INC., an Illinois Corporation,
Appellee.

Feb. 21, 1975.

John P. Frank, of Lewis & Roca (argued), Phoenix, Ariz., for appellants.

William G. Myers, of Rothschild, Barry & Myers, Chicago, Ill. (argued), for appellee.

OPINION

Before TRASK and SNEED, Circuit Judges, GRAY,* District Judge.

SNEED, Circuit Judge:

This is an appeal from a trial court judgment awarding treble damages, attorney's fees and costs to appellee-counterclaimant Charles O. Finley & Company, Inc. (Finley)

* Honorable William P. Gray, United States District Judge, Central District of California, sitting by designation.

on the ground that a 1950 contract between the then-owner of the Athletics baseball team and a predecessor in interest of appellant Twin City Sportservice, Inc. (Sportservice) violated §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. Sportservice initiated the suit against Finley in 1967, alleging breach of contract by the latter, and seeking declaratory, injunctive, and monetary relief. Finley filed a counterclaim, charging antitrust violations, and joined Sportservice Corporation, the parent of Sportservice. Jurisdiction was based, in the contract action, upon 28 U.S.C. §1332 and, on the antitrust claims, upon 15 U.S.C. §§15 and 22.

The dispute which culminated in this litigation finds its origins in a concession franchise contract signed September 25, 1950, the parties to which were Penn Sportservice, Inc. (Penn), a predecessor in interest of Sportservice, and the American League Baseball Club of Philadelphia (the then-owner of the Philadelphia Athletics baseball club), which in turn was owned by Connie Mack. The latter also owned Shibe Park (Connie Mack Stadium) where the Athletics' home games were played. At the time the contract was negotiated the Athletics had just concluded the baseball season with a losing record and were experiencing financial problems. On August 28, 1950 Mack had arranged to borrow $1,750,000 from the Connecticut General Life Insurance Company and in return gave a first mortgage on the stadium and agreed to assign his share of concession receipts as security.

The 1950 contract with Penn produced an additional source of revenue for the Athletics. By its terms Penn obtained a fifteen-year exclusive concession franchise for all events at Shibe Park, which was to be "unaffected by change of ownership" for whatever reason. For its part, Penn advanced the team the sum of $150,000 and agreed to pay them 29% of its gross concession receipts and 35% of its advertising receipts, guaranteeing certain minimum payments. Penn also purchased the existing concession equipment at the stadium for $100,000, subject to an obligation on the part of the team to repurchase it for a like sum under certain conditions, and agreed to loan the Athletics an additional $100,000 in the future.

The contract was amended on July 1, 1952 to terminate any obligation of the team to repay the $100,000 equipment purchase price and in return the franchise was extended by ten years. In 1953, in order to secure a loan from Penn, the Athletics confirmed by letter that if the team should move, the concessionaire would "follow the franchise," i.e., the Sportservice franchise would continue both at Shibe Park and at any new location of the club.

The Athletics changed hands in 1954 and when Arnold Johnson, the new owner, moved the team to Kansas City shortly thereafter, Penn's concession franchise right travelled with it under the follow-the-franchise provison. Johnson also decided to sell Shibe Park to the Phillies ball club and in order to facilitate the transaction, arranged to reduce the remaining term of the Penn franchise at the stadium by eight years and in turn, to extend the duration of the concession agreement with the Athletics by the same period. At that time Penn assigned its franchise right under the contract—which now ran for 33 years—to Sportservice and the latter undertook the concessions operations in Kansas City.

In 1961 Charles O. Finley & Company acquired ownership of the Kansas City Athletics, and Sportservice continued its concessions operations through the end of the 1967 baseball season, when Finley moved the team to Oakland, California. Sportservice, on the basis of the follow-the-franchise provision, insisted that its concession franchise was not terminated by the move; Finley, however, countered that it was not bound by the 1950 agreement. In 1968 another concessionaire, Volume Service Company, commenced operations at the Athletics' home games pursuant to a 1966 contract with Coliseum, Inc., the Oakland stadium authorities.

Sportservice filed suit, claiming that Finley is bound by the 1950 contract. Finley denied this and argued that the terms of the contract violated §§ 1 and 2 of the Sherman Act. The case was bifurcated into contract and antitrust segments and trial on the latter claim awaited resolution of the former. At the conclusion of trial on the contract issue the court found that "there was an understanding that the concession contract would

follow the franchise prior to Finley's purchase of the Athletics or, in any event, that Finley had ratified such an understanding and was now estopped from denying it." Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 365 F.Supp. 235, 238 (N.D.Cal.1972). Thus Finley would be bound by the 1950 contract and liable to Sportservice for damages for breach unless it prevailed on the antitrust counterclaim in the subsequent trial. There, the court found that the counter-defendants had violated §§ 1 and 2 of the Sherman Act and that Finley had been proximately injured thereby in the amount of $282,168, to be trebled. This appeal followed. We reverse and remand for further proceedings.

We shall first discuss whether Finley's antitrust claims are barred by limitations. Next we shall discuss the trial court's holdings that Sportservice properly was guilty of actual monopolization and restraint of trade pursuant to Sections 2 and 1, respectively, of the Sherman Act. Thereafter we shall consider the trial court's conclusion, which it considered unnecessary to its judgment, that Sportservice engaged in a tying arrangement constituting a *per se* violation of § 1 of the Sherman Act. To conclude this opinion, we shall consider the trial court's holding that Sportservice, contrary to § 2 of the Sherman Act, attempted to monopolize. Throughout this opinion, for convenience, all actions taken by Sportservice's predecessor in interest, Penn, are attributed to Sportservice.

I.

Limitations

Certain defenses to Finley's counterclaim were raised in the Sportservice brief that were not pressed upon the trial court. In view of our disposition of this case we feel it necessary to deal only with the assertion by Sportservice that Finley's treble damage action is barred under 15 U.S.C. § 15b, which provides that such actions are "forever barred unless commenced within four years after the cause of action accrued." A civil cause of action under the Sherman Act arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations

begins to run at that time. Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd., 185 F.2d 196, 208 (9th Cir. 1950), cert. denied 340 U.S. 943, 71 S.Ct. 506, 95 L.Ed. 680 (1951). Sportservice argues that Finley's suit is barred because it was not filed within four years of the last allegedly damaging act, the amendment or extension of the contract to its complete 33-year duration in 1954. This argument overlooks the necessarily continuing nature of the alleged harm. As the Supreme Court stated in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502 n. 15, 88 S.Ct. 2224, 2236, 20 L.Ed.2d 1231 (1968),

> "We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. [Citation omitted.] Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm . . . "

Thus the fact that the final amendment to the contract was made in 1954 does not preclude Finley from bringing suit in 1968. To hold otherwise is to say that some damage that might have been sustained was barred before it accrued. Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 732 (8th Cir. 1964).

II.

Actual Monopolization

There are two prerequisites to a showing of actual monopolization under § 2 of the Sherman Act, "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 458 (9th Cir. 1966), rev'd on other grounds, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967). If the first element is absent the analysis need proceed no further.

Monopoly power is the power to control prices or exclude competition. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), cert. denied 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). Since "size is of course an earmark of monopoly power," United States v. Griffith, 334 U.S. 100, 107 n. 10, 68 S.Ct. 941, 946, 92 L.Ed. 1236 (1948), the existence of such power ordinarily may be inferred from the predominant share of the market. United States v. Grinnell Corp., *supra*, 384 U.S. at 571, 86 S.Ct. 1698; Jack Winter, Inc. v. Koratron Co., Inc., 375 F. Supp. 1, 68 (N.D.Cal.1974).

Therefore, to determine whether a party has monopoly power it is essential first to define the "relevant market." Case-Swayne Co., *supra*, 369 F.2d at 454. Clearly, a determination of the relevant market is a necessary predicate to finding a violation of § 7 of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962); United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957). The area of effective competition is defined in terms of a product market and a geographic market. Brown Shoe, *supra*, 370 U.S. at 324, 82 S.Ct. at 1502; Crown Zellerbach Corp. v. F.T.C., 296 F.2d 800, 804 (9th Cir. 1961), cert. denied 370 U.S. 937, 82 S.Ct. 1581, 8 L.Ed.2d 807 (1962). The same inquiries regarding the relevant market must, therefore, be undertaken in actions charging violation of § 2 of the Sherman Act since there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." United States v. Grinnell Corp., *supra*, 384 U.S. at 573, 86 S.Ct. at 1705; Case-Swayne Co., *supra*, 369 F.2d at 454.

In the present case, the lower court held, and it was not disputed on appeal, that the relevant geographic market is a national one. Controversy arises, however, in connection with the definition of the relevant product market. The Supreme

Court has recognized that "[t]he 'market,' as most concepts in law or economics, cannot be measured by metes and bounds.... For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range." Times Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 612 n. 31, 73 S.Ct. 872, 881, 882, 97 L.Ed. 1277 (1953). Nor, however, is it proper to read the Sherman Act "to require that products be fungible to be considered in the relevant market." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394, 76 S.Ct. 994, 1006, 100 L.Ed. 1264 (1956). Therefore, "[i]n defining the product market between these terminal extremes, we must recognize meaningful competition where it is found to exist." United States v. Continental Can Co., 378 U.S. 441, 449, 84 S.Ct. 1738, 1743, 12 L.Ed.2d 953 (1964).

The proper point of departure in any discussion of the relevant product market must be the rule of "reasonable interchangeability," enunciated in United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956). According to the Court,

> In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of trade or commerce", monopolization of which may be illegal.

That is, where there is a high degree of *substitutability in the use* of two commodities, it may be said that the cross-elasticity of demand between them is relatively high, and therefore the two should be considered in the same market.

A like analysis applies when the market is viewed from the production rather than the consumption standpoint; the degree of substitutability in production is measured by cross-elasticity of supply. Substitutability in production refers to the ability of firms in a given line of commerce to turn their productive facilities toward the production of commodities in another line because of similarities in technology between them. Where the degree of substitutability in production is high, cross-elasticities

of supply will also be high, and again the two commodities in question should be treated as part of the same market. While the majority of the decided cases in which the rule of reasonable interchangeability is employed deal with the "use" side of the market, the courts have not been unaware of the importance of substitutability on the "production" side as well. Brown Shoe Co. v. United States, 370 U.S. 294, 325 n. 42, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); United States v. Columbia Steel Co., 334 U.S. 495, 510-11, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948).

With these principles in mind, we turn to the district court's definition of the relevant market. Its definition is founded on the premise that the concessionaire is the seller of concession services and that the purchaser of these services is the baseball team or stadium owner. From this premise it derived the conclusion that the sale of concession services to major league baseball was the relevant market. In reaching this conclusion it relied heavily upon its characterization of major league concession contracts as uniquely desirable contracts from the standpoint of a concessionaire. The district court observed, "There is no evidence of any willingness of a concessionaire to trade a major league baseball concession for any other or for a cluster of others; nor is there evidence of a club owner trading his share for a non-baseball concession share." Twin City Sportservice, *supra*, 365 F.Supp. at 245. In addition, the trial court found that the per team annual spectator attendance is larger for major league baseball than for any other sport and that it enjoys the highest per capita concession revenues and produces the highest total concession revenues and profits of all sports. *Id.* at 242. We cannot accept this definition of the relevant market.[1]

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[1] Even if we agreed with the trial court's basic premise, that the provision of concession services to major league baseball was the relevant market, its failure to include as participants in that market baseball clubs which supply their own concessions very likely would compel reversal on that ground. The considerations which, in the view of the trial court, make the opportunity to provide concession services to a major league baseball club a uniquely desirable and profitable one in the eyes of a professional concessionaire must also appeal to the stadium or team owner-cum-entrepreneur. Thus, the exclusion from the relevant market of baseball teams which run their—own concessions operations—a pro-competitive influence in that market—could not be supported even under the trial court's conceptualization.

We begin by pointing out that a concessionaire sells hot dogs, beer, and other concession items to spectators at various types of events. The market in which the concessionaire sells is the concession products market. Payment for these products is made by the spectators to the concessionaire. The authority to enter the concession products market in a particular place, manner, and time is obtained by the concessionaire from the ball team or stadium owner. This authority constitutes a franchise. In exchange for obtaining a franchise the concessionaire undertakes to make certain payments to the grantor of the franchise, at least a portion of which payments generally are determined by reference to the gross receipts of the concessionaire.

These facts lead us to conclude that the trial court erred in treating Sportservice as a seller of concession services to major league baseball teams. Such services are sold to spectators who directly and immediately pay therefor—not to the major league baseball teams. The relationship between the major league baseball team or stadium owner and the concessionaire is one in which a *franchise* is sold by the ball team or stadium owner to the purchasing concessionaire. The market in which the franchise is sold is the franchise market—a market quite distinct from the concession products market. It follows that the relevant market with which we are concerned here is one in which the articles of commerce are franchises, not concession services. Ample testimony to support this conclusion of law was offered in the proceedings below.

We must hold, therefore, that the district court erred in its designation of the relevant market. We do not believe, however, that the present record permits us to fix the relevant franchise market. At trial, Sportservice argued that the relevant market should be defined in terms of "the exchange of concession franchises, for the sale of a limited menu of concession items, to spectators in a closed area, either by vendors, by stands or both, where the preparation requires at most a grill and not a kitchen." So defined the market would encompass franchises at 1,250 arena-auditoriums, 850 stadiums, 623 horse racing tracks, and 35 dog racing tracks. Sportservice on appeal

appears to have narrowed its definition to include only major sports stadiums and arenas. In view of the fact that the district court erroneously focused its attention on the sale of concession services, the present record does not enable us to determine the precise outlines of the relevant franchise market. We must, therefore, remand this case to the district court to determine the scope of the relevant franchise market.

In determining the proper relevant franchise market the district court should be guided by the following observations. We have already indicated that a concessionaire is a buyer in the franchise market and a seller in the concession products market. The willingness of a concessionaire to bid for a concession franchise depends upon his ability to move from selling concession items to spectators at one type of event or facility to those at the event or facility for which the franchise is offered. Only when his resources easily can be devoted to the concession products market for which the franchise is offered can the concessionaire make effective use of the franchise. Put in the technical terms of antitrust law, the cross-elasticity of supply in the concession products market limits the cross-elasticity of demand in the franchise market.

The evidence before the trial court strongly suggests that there is a high degree of "substitutability in production." That is, the evidence was sufficient to support a finding that many aspects of the concession operations at the various facilities presenting leisure time events other than major league baseball are the same or similar enough to each other and to those existing at major league baseball parks to be considered substitutable or transferable. Moreover, some concessionaires utilize the same employees, stands and equipment to sell concession items at different events in a given facility and, at the higher managerial level, also employ the same purchasing agents and supervisorial personnel. There exists evidence of inter-facility transferability as well. Stadium and ball club owners testified that in choosing a concessionaire, previous baseball experience is not a *sine qua non* for selection. It is only necessary that the prospective concessionaire have engaged in a

concession operation of a comparable magnitude so as to demonstrate an ability to perform satisfactorily.

It follows that the relevant franchise market cannot be limited to those offered for sale by major league baseball teams. The mere fact that, as the trial court found, major league baseball, because of its long season, frequency of games, and pace of play, produces the highest total concession revenues and profits of all sports does not alter this conclusion. The major league baseball team concession is a coveted franchise for this reason and, as a consequence, commands a high price on the franchise market. There are, however, other leisure time activities that offer for sale other concession franchises for which there are bids by concessionaires capable of serving both that for which they bid as well as major league baseball.

The authorities involving "submarkets" cited by the trial court to support its conclusion of law that the sale of concession services to major league baseball teams constituted the relevant "submarket" or "part" of commerce included International Boxing Club v. United States, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959) (promotion of championship boxing contests); United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957) (automobile finishes and fabrics); United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948) (rolled steel); United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948) (first run movies); Fashion Originators Guild v. F. T. C., 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941) (original design dresses). These cases are inapposite. Each involved the issue whether a seller of a unique property in the relevant submarket had violated the antitrust laws. Were the issue before us whether major league baseball, in whole or in part, constituted an illegal monopoly, these cases would be in point. The focus of our attention is different, however. It is upon the buyer of concession franchises from major league baseball teams as well as other vendors who offer other sporting events or who operate stadia and arenas. To determine the relevant market in which this buyer operates we must, as already indicated, examine the cross-elasticity of supply in the concession products market.

Moreover, the scope of the relevant market is not governed by the presence of a price differential between competing products. In *du Pont*, for example, the Supreme Court included cellophane in the flexible wrapping market, along with glassine and grease-proof papers, its chief competitors, despite the fact that its cost was two or three times as great. 351 U.S. at 401, 76 S.Ct. at 994.

The relevant franchise market, however, does not embrace franchises offered in connection with leisure time activities that require the maintenance of a full kitchen. The requisite substitutability in production is lacking in this instance. The franchise market with which the trial court should be concerned on remand of this case is that which envisions the sale by the concessionaire of a limited range of concession items to spectators in a closed area, either by vendors, stands, or both, where the preparation requires at most a grill and not a kitchen. The leisure time activities with respect to which franchises within the relevant market are available are undoubtedly numerous. They may include all or a substantial number of the following: *viz.*, football, basketball, hockey, soccer, boxing, racing, track and field, rodeos, circuses, and music festivals. Likewise the sellers of such franchises may include professional teams, sports organizations, and public and private operators of stadiums, arenas, race tracks, convention centers and amusements parks.

We conclude these guides to the trial court by observing that in establishing the relevant franchise market the trial court (1) should apply the test of reasonable interchangeability and (2) should treat the leisure time activity or facility manager as the seller of the franchise and the concessionaire as the purchaser.

Our decision to remand this case makes it unnecessary to determine whether a 50% share of a major league baseball concession market amounts to a sufficient showing of monopoly power. We do, however, wish to remind the trial court when considering this case on remand of Judge Learned Hand's famous dictum that while 90% of the market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is

not." United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945). It also should be recalled that on several occasions courts have considered a 50% share of the market as inadequate to establish a proscribed monopoly. *See* Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97, 104 (10th Cir.), cert. denied, 414 U.S. 975, 94 S.Ct. 290, 38 L.Ed.2d 218 (1973); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 207 (5th Cir. 1969); Jack Winter, Inc. v. Koratron Co., Inc., 375 F.Supp. 1, 68 (N.D.Cal.1974); United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 346 (D.Mass.1953), aff'd per curiam, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954).

III.

Restraint of Trade

Our reversal and remand to determine the relevant franchise market also requires that we reverse and remand the trial court's finding that the 1950's contract between Sportservice and the Athletics was "unreasonably long in its original form and highly anti-competitive upon the addition of the ten and eight-year provisions . . ." Twin City Sportservice, *supra*, 365 F.Supp. at 253. This is required because it is necessary to establish the proper relevant market before it can be determined whether a particular exclusive-dealing arrangement unreasonably restrained competition in a substantial share of that market. This determination is necessary by reason of the application of the teaching of Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961), a § 3 of the Clayton Act case, to §1 of the Sherman Act.

The test announced in *Tampa Electric* is as follows: "In practical application, even though a contract is found to be an exclusive-dealing arrangement, it does not violate the section [§ 3, Clayton Act] unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Id.* at 327, 81 S.Ct. at 628. These parties appear to agree that this test provides an appropriate guide. To apply this test it is necessary

to determine (1) the line of commerce affected, (2) "the area of effective competition" in this line of commerce, and (3) whether the competition foreclosed constitutes a substantial share of that within "the area of effective competition." Inasmuch as "the area of effective competition" is the relevant market, *id.* at 328, 81 S.Ct. at 623, it follows that application of the *Tampa Electric* test under § 1 of the Sherman Act requires a proper determination of the relevant franchise market. Since this has not been done there is no need for us to comment further on whether the facts of this case meet the test.

Nonetheless, we should not close this discussion without making two observations. The first is that a greater showing of anti-competitive effect is required to establish a Sherman Act violation than a § 3 Clayton Act violation in exclusive-dealing or requirements contracts cases. *See* E. Kintner, An Antitrust Primer, 58 (2d ed. 1973). The existence of this heavier burden is rooted in the language of the two statutes; the Sherman Act speaks of actual restraints of trade while § 3 of the Clayton Act speaks of effects of arrangements which may substantially lessen competition or tend to create a monopoly. The heavier burden required by the Sherman Act was recognized in connection with "tying" cases in Times Picayune v. United States, 345 U.S. 594, 608-9, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). *See also,* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 335, 81 S.Ct. 623, 5 L.Ed.2d 580 (1960); Curly's Dairy, Inc. v. Dairy Cooperative Ass'n, 202 F.Supp. 481, 485 (D.Or. 1962).

Our second comment relates to the follow-the-franchise provision in the Sportservice-Athletics agreement which the trial court found acted as a restraint of trade as well as a mechanism to enforce the long term contract. We are inclined to doubt that this provision has independent anti-competitive effects apart from those springing from the length of the contract. Our doubt rests on the belief that in these days of highly mobile professional sports franchises follow-the-franchise provisions are needed even when the duration of the concession franchise is relatively short.

IV.

Tying

Our decision to reverse and remand the judgment of the trial court for the purpose of fixing the relevant franchise market makes it necessary that we consider the trial court's conclusion that Sportservice is guilty of a *per se* violation of §1 of the Sherman Act under the reasoning of Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969).

Fortner held that to offer loans on favorable terms on condition that the borrower purchase prefabricated houses constituted "a tying arrangement of the traditional kind," 394 U.S. at 498, 89 S.Ct. at 1256. Such an arrangmennt is illegal *per se* "whenever a party [the lender-seller] has sufficient economic power with respect to the tying product [the loan] to appreciably restrain free competition in the market for the tied product [prefabricated houses] and a 'not insubstantial' amount of interstate commerce is affected." *Id.* at 499, 89 S.Ct. at 1256, citing Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). Here the trial court characterized the advances made by Sportservice to the Athletics as the tying product and its concession services as the tied product and concluded that there was an appreciable restraint on free competition and that a not insubstantial amount of interstate commerce was affected.

Our holding with respect to the relevant franchise market dictates our disapproval of this conclusion of the trial court. We view Sportservice as a purchaser of a concession franchise from the Athletics, the seller, in exchange for payments consisting of (1) certain loans and advances and (2) a percentage of gross receipts, payable throughout the life of the contract. Viewed in this manner, the *sine qua non* of a tying case, *viz.* two separate products, is lacking. *See* Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47 (9th Cir. 1971), cert. denied, 405 U.S. 955, 92 S.Ct. 1172, 31 L.Ed.2d 232 (1972). The cash, advances, and percentage of the gross receipts constitute the means by which Sportservice is to pay the purchase price of the franchise. The

only product involved is the franchise. A loan on favorable terms in connection with a purchase of a commodity by the lender is simply a means by which the lender meets his purchase money obligation. This is true without regard to the type of commodity purchased. The favorable aspect of the loan undoubtedly would not have been agreed to by the purchaser had he not wished to acquire the commodity the seller-borrower is offering for sale. The seller-borrower's monopoly power may induce such a loan; but that does not warrant the transformation of the purchaser-lender into a seller of two commodities, cash payments and a favorable loan, for the purpose of charging such purchaser-lender with Sherman Act violations.

The absence of two separate products, the presence of which must exist in order to justify invoking *Fortner,* 394 U.S. at 507, 89 S.Ct. at 1252, makes it unnecessary for us to review the trial court's findings that Sportservice had sufficient economic power in the market for the tying product, credit, and that the amount of commerce affected in the tied product, concession services, was not insubstantial. We merely wish to point out that the trial court's determination that the Athletics "had exhausted its credit," 365 F.Supp. at 254, alone cannot support such findings. The near insolvency of the Athletics in the early 1950's and Sportservice's loan to it does not establish the requisite market power.

V.

Attempt to Monopolize

The trial court's finding that Sportservice is guilty of an attempt to monopolize under § 2 of the Sherman Act must also be reversed. Although it is well established in this circuit that the "probability of actual monopolization" is not an essential element of proof of intent to monopolize, Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), cert. denied, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964), it is also clear that evidence of market power is relevant but "not indispensable where a substantial claim of restraint of trade is made."

Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8, 12-13 (9th Cir. 1974). In view of our rejection of the trial court's characterization of the relevant market and the necessity on remand to consider concession franchises other than those offered by major league baseball teams, it is not possible for us to conclude under the present state of the record that a "substantial claim of restraint of trade" has been made. In due course such a claim may be made. Under present circumstances, however, such a claim could be said to exist only if we were prepared to accept the trial court's determination that the relevant market is concession services furnished to major league baseball teams. This we cannot do. We reverse the trial court's finding with respect to an attempt to monopolize and remand for further proceedings.

Reversed and remanded.

APPENDIX E

DISTRICT COURT OPINION, OCTOBER 17, 1972

Appendix E

United States District Court

N. D. CALIFORNIA

CIV. No. 48234 TCC.

TWIN CITY SPORTSERVICE, INC.,
a Missouri corporation, Plaintiff,

v.

CHARLES O. FINLEY & COMPANY, INC.,
an Illinois corporation; and
Charles O. Finley, an Individual, Defendants.

CHARLES O. FINLEY & COMPANY, INC.,
an Illinois corporation, Counter-Claimant,

v.

TWIN CITY SPORTSERVICE, INC.,
a Missouri corporation; and
Sportservice Corporation, a New York
corporation, Counter-Defendants.

Sept. 29, 1972.

As Amended Oct. 17, 1972.

Frederick P. Furth, John H. Boone, Thomas J. Gundlach, Geoffrey P. Knudsen, San Francisco, Cal., for plaintiff and counter-defendants.

Law Offices of Rothschild, Barry & Myers, William G. Myers, Alan L. Unikel, Chicago, Ill., Stark, Simon & Sparrowe, Stanley E. Sparrowe, Oakland, Cal., for defendants and counter-claimant.

AMENDED MEMORANDUM OF DECISION FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Justice Clark*:

This case was originally filed as a diversity action for the alleged breach of a concession contract and damages arising therefrom. Originally the contract was between Penn Sportservice, Inc. of Pennsylvania (PENN), a predecessor in interest of the plaintiff Twin City Sportservice, Inc. (TWIN CITY), and Connie Mack's American League Baseball Club of Philadelphia (PHILADELPHIA ATHLETICS). It was dated September 25, 1950, called for a 15-year term and provided that its terms were to be "unaffected by change of ownership." Penn paid the Philadelphia Athletics $150,000 cash, $100,000 for existing concession equipment, an agreement to loan $100,000 and to pay 29 percent on the gross receipts from a limited menu of concession items sold to spectators at all events, including home games of the Philadelphia Athletics, at Shibe Park. Two years later the contract was amended releasing the Philadelphia Athletics from repayment of the $100,000 previously paid for the existing concession equipment at the end of the term and providing that Penn make certain concession improvements. The term of the contract was enlarged to 25 years (a ten-year increase).

In 1954 the Philadelphia Athletics came under new ownership (Johnson) and were moved to Kansas City, Missouri, becoming the "Kansas City Athletics." In order to reduce the term of a lease held on Shibe Park, the 1950 contract was extended an additional 8 years and the concession followed the team to Kansas City under a "follow the franchise" claim.[1]

In 1961 the defendant Charles O. Finley & Company, Inc. (FINLEY), acquired the Kansas City Athletics and, after the 1967 season, moved the team to Oakland, California, where it assumed the name of "Oakland Athletics." Finley took the

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* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

[1] "Follow the Franchise" agreements provide that if the baseball franchise is moved to another facility, the concession contract goes with it.

position that it was not bound by the 1950 contract which still had 16 years of its term remaining. It began negotiating with Coliseum, Inc., the Oakland stadium authorities, regarding concession matters when this suit was filed. Twin City (successor to Penn) contends that Finley is bound by the 1950 contract until expiration on January 1, 1984. On application of Twin City, Judge Peckham issued a temporary injunction enjoining Finley from entering into any contract which would prejudice the rights of Twin City, subject to the final decision in this case. Since that time, conditioned as directed by the Court, Volume Service, a concessionaire of Seattle, Washington, has been performing at home games of the Oakland Athletics pursuant to its 1966 contract with Coliseum, Inc.

Subsequently, Finley filed a cross-action in this suit and impleaded Sportservice Corporation, a New York corporation (SPORTSERVICE)[2] and parent of Twin City, asserting that if Finley was bound by the 1950 contract—which it denied—that the contract violated the Federal antitrust laws. Finley also asserted a damage claim. On February 14, 1969, Judge Peckham ordered the case bifurcated and set the contract issue for trial, withholding the antitrust claim until after the contract issue was determined. In June, 1970, the case was assigned to the writer pursuant to his designation to sit in the Northern District. On August 24, 1970, the contract issue came on for hearing before the Court without a jury and testimony was heard for a week. On September 11, 1970, the Court found that there was an understanding that the concession contract would follow the franchise prior to Finley's purchase of the Athletics or, in any event, that Finley had ratified such an understanding and was now estopped from denying it.

During the hearing on the contract issue, the parties also developed from the witnesses appearing, facts concerning the anti-trust issue, and Finley offered some additional exhibits on its antitrust counterclaim and rested subject to proving up its damages. Twin City had requested an adjournment before going into the trial on the antitrust issue because of a previous

[2] When referrring to Sportservice hereafter, all of the Sportservice is included, unless otherwise indicated.

setting of a protracted case in another Federal Court in which its attorneys were involved. In order to save the delay as well as the necessity of a further hearing, the Court suggested that Sportservice file offers of proof regarding its antitrust defenses, which was subsequently done. Under the offers the Court tentatively decided that the 1950 contract violated the Federal antitrust laws. However, after a hearing the Court at the request of Sportservice, on May 24, 1971 reopened the case for the hearing of further testimony. Sportservice took over 20 depositions, after which the trial was resumed on September 13, 1971. Unfortunately, the death of Mr. Justice Black and previous commitments brought about an adjournment on September 25 until October 22, after which the trial was concluded. Evidence had been received for 28 full trial days with almost 6000 pages of transcript and in excess of 800 exhibits. Subsequently, voluminous briefs, suggested findings, et cetera (all totalling over 500 pages) were filed and the case was taken under submission on February 1, 1972.[3]

1. Jurisdiction and Commerce:

There is no contest over jurisdiction, the parties acknowledging that the contract issue lies under 28 U.S.C. § 1332 and the antitrust ones are under 15 U.S.C. § 15 and § 22; and Sportservice concedes that the commerce involved in this suit is interstate commerce.

2. The Parties and Their Respective Businesses:

(a) Sportservice is engaged nationally in the sale of concession services for sporting events, et cetera, including the sale of food, refreshments, beverages, novelties and in some instances, advertising, program printing, et cetera, at baseball, football, basketball, hockey, dog and horse racing and other spectator sporting events. The business originated with three brothers, Marvin, Louis and Charles Jacobs, and was known as Jacobs Brothers. It was originally limited to the sale of

[3] Delay in preparing this opinion and findings has been occasioned by prior commitments made by the writer to sit in the various Courts of Appeals in anticipation that this case would be concluded in the Fall of 1971.

popcorn, et cetera, at the Academy Theater in Buffalo, New York where the brothers lived. However, it expanded to other cities and turned to baseball to gain an outlet during the summer when theaters were closed because of the hot weather. Their first baseball concession was in New Jersey, but by 1919 they were operating also in Buffalo and Baltimore. In 1930 they sold their first "big league" club, the Detroit Tigers, and in 1939 were successful in securing the concession at the Washington National Airport. In the early 1940's they expanded their business into racetracks and indoor sport arenas. At the close of World War II, Jacobs Brothers served some 100 minor league baseball clubs, three major ones (Detroit, Pittsburgh and Cincinnati), three indoor facilities and one racetrack. They then began their expansion into major league baseball. By 1961, out of a total of 15 clubs using outside services, Sportservice had ten of them; in 1971 it had ten[4] clubs out of twenty-two American and National League franchises that use outside concessionaires. The terms of the contracts vary from ten years (Washington, D. C.) to a possible 100 years (Pittsburgh). In addition, Sportservice serves approximately 84 contracts at other sport facilities.[5]

In 1948 the brothers incorporated Sportservice Corporation which succeeded Jacobs Brothers. Originally the stock was distributed in equal shares between the brothers, but subsequently Louis Jacobs obtained the interest of Marvin and Charles and became the sole owner. Each of the concession contracts is serviced by a separate corporation—of which there are about one hundred—and they are owned or controlled by Sportservice Corporation which in turn is controlled by Emprise Corporation (EMPRISE) which for operating purposes serves as the parent corporation. Emprise owns the stock of Sportservice except for 5 percent which is in the Louis Jacobs estate. In

[4] Two of the ten are in litigation: Pittsburgh and Oakland [involved here].

[5] It has had an ownership interest in an indoor arena, a fronton, a group of bowling alleys, eight dog tracks, twenty three horse race tracks, a basketball team; and a part interest in the following concessionaires: Race track Concessions, Inc., Far West Recreations, B & L Concessions and Gladieux Corporation.

addition to being the overall holding company for the system, Emprise also makes loans to baseball franchise owners, as well as other owners or operators of sports operations or facilities.

As has been indicated, the Sportservice system's concession contracts are serviced at spectator events in stadiums, arenas, racetracks (horse and dog), convention halls, auditoriums, theaters, airports, snack bars, airline-in-flight feeding and major expressway restaurants. The annual sales of the system exceed $103,000,000 annually, on which its profit is around 10 percent. Its baseball concessions run somewhat higher profits of 13 percent of aggregate gross sales. While it is disputed, there is also testimony that the Sportservice system is the largest concessionaire in the spectator events field in this country, if not in the world. Beyond question, it operates in more major league baseball parks, sports arenas and buildings and racetracks than any of its competitors.

(b) Finley is a comparative newcomer to the baseball world. It became the owner in 1961 of the old Connie Mack franchise of the American League of Professional Baseball Clubs, known as the Philadelphia Athletics. The purchase was after the Philadelphia Athletics had been moved to Kansas City and had become the Kansas City Athletics. At the time, the Sportservice system was performing under the 1950 contract with Connie Mack and continued to do so until Finley moved the team to Oakland. This was the basis upon which the Court found that Finley was estopped from denying not only the 1950 contract but also that the "follow the franchise" agreement was part and parcel of it.

3. The Relevant Market:

(a) There is no dispute with regard to the geographical market being national. The difference comes with regard to the line of commerce. Sportservice contends that the relevant market should include "the exchange of concession franchises for the sale of a limited menu of concession items, to spectators in a closed area, either by vendors, by stands or both, where the preparation requires at most a grill and not a kitchen." It would include in the relevant market the supplying of concession

services to 1250 arenas-auditoriums, 850 stadiums, 623 horse racing tracks and 35 dog racing tracks. It then concludes that since Sportservice has the concession service at 24 arenas-auditoriums, 12 stadiums, 13 dog tracks and 45 horse racing tracks, it has about 4 percent of the relevant market. Finley, on the other hand, says the supplying of concession services at major league baseball games constitutes the relevant market or submarket. As most everyone knows, major league baseball consists of two leagues, i.e., the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs. Since 1969 there have been 12 baseball teams or clubs in each league; from 1962-1968 there were ten; prior to that each league had 8 teams, except for one year, 1961, when the American had 10 teams. Prior to 1961 each team played 154 games per season; commencing in 1962 each team has played 162 games. Half of the games scheduled are played at home. No two teams in the same league play their home games in the same city. At certain times one ball park was used for the home games of both the American and National League Clubs located in Philadelphia and St. Louis.

Concession items at major league baseball parks consist of scorecards, novelties, hot dogs, peanuts, popcorn, beer, soft drinks, ice cream and other snack items. They are sold before, during and after the staging of major league games. In two instances the home baseball teams handle the concessions themselves, but the remaining ones contract it out to a professional concessionaire. The transaction calls for the furnishing of services by the concessionaire to the team or ball park owner in which the former has the exclusive right to sell concession items at the home games of the ball club. The average annual sales at the major league baseball parks under concession contract is approximately two million dollars.

(b) The cases of the Supreme Court teach us that a service market is subject to the Sherman Act just as is a product one. United States v. Grinnell Corporation, 384 U.S. 563, 573, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1963); that the relevant market selected must reflect "commercial realities," Id. at 572, 86 S. Ct. 1698; that there may be submarkets that are separate economic

entities, Id. at 572, 86 S.Ct. 1698; that there is no reason to differentiate between "line" of commerce in the context of the Clayton Act and "part" of commerce under the Sherman Act, Id. at 573, 86 S.Ct. 1698; that there are substitutes for various types of services but they must operate at the same level to meet the interchangeability test of *DuPont*, (United States v. E. I. DuPont etc.) 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264, Id. 384 U.S. at 573, 86 S.Ct. 1698; that where there are "marked differences, not the low degree of differentiation required of substitute services" a distinct, separate market or submarket is present. Id. 384 U.S. at 573, 86 S.Ct. 1698. *Grinnell* also says that even though competition is present from other modes of service—though the degree there was seriously overstated —prices cannot always be controlled "due to fringe competition." But what must not be overlooked is "that the high degree of differentiation (between the markets) for many customers . . ." is the decisive factor. Id. at 574, 86 S.Ct. at 1706. The Court approved the accredited central station service alarm system as the only one that would do for many customers and was, therefore, a relevant market.

And in Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962), the Court found the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." At 325, 82 S.Ct. at 1523. It found three relevant lines of commerce: men's, women's and children's shoes.

Still another case apposite here is International Boxing Club v. United States, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959), where the Court chose the promotion of championship boxing contests as the relevant market. In so doing, the Court carved out all of the other professional boxing events. International insisted that the "physical identity of the products . . . would seem necessarily to put them in one and the same market." (The same argument that Sportservice makes here). But the Court found that the market varied with the part of commerce under consideration. And in appraising the revenue, the television and movie rights, the Nielsen Ratings,

the public demand, the price of the tickets, et cetera, said that other professional boxing was not reasonably interchangeable with the championship fights.

In United States v. DuPont, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957), the Court again carved out automobile finishes and fabrics as a separate, identifiable market having "sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a [relevant market]." In a number of earlier cases the Court found small segments of an industry's products as constituting "a relevant competitive market." United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948) ("rolled steel"); United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948) ("First run" movies)[6]; Fashion Originators' Guild v. F. T. C., 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941) ("original design" dresses). The Courts of Appeals have likewise been discriminating. Judge Learned Hand in United States v. Aluminum Company, 148 F.2d 416 (2 Cir. 1945) ("virgin" aluminum); Crown Zellerbach Corporation v. F. T. C., 296 F.2d 800 (9 Cir. 1961) (Census coarse paper); Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449 (9 Cir. 1967) (product of orange).

(c) The supplying of concession services to major league baseball has so many "marked differences" when compared with those furnished other sports or enterprises that it encompasses a separate, distinct and unique market. Indeed, "the commercial realities" of major league baseball concessions creates a relevant market of its own:

(1) The concession contract covers 80 or more "home" games for each team (more than any other sport) and the longest "season" each year; the per team annual spectator

[6] The court found the "first-run field, which consititutes the cream of the exhibition business, is the core of the present cases. Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved . . . and § 2 condemns monopoly of 'any part' of trade or commerce." At 172-173, 68 S.Ct. at 936.

attendance is larger than any other sport; it enjoys the highest per capita concession revenues and produces the highest total concession revenues and profits of all sports; it has more TV and radio coverage than any sport, and has "top billing" in the news media[7]; and it has the highest confidence of the public—prestige-wise—more than other sports.

(2) Major league baseball is the "prime tenant" in the stadia where it is played. It thereby affords exclusive rights to its concessionaire to all events being staged in its stadia. If baseball owns the stadiums, it always retains or extends to its concessionaire exclusive rights to serve all events at the stadiums, i.e., Los Angeles, Boston, Chicago (both National and American Leagues). Where baseball is the tenant, it customarily designates the concessionaire for all events staged in the stadiums and invariably selects its own, i.e., Seattle, Milwaukee, Baltimore, Montreal, Cincinnati, Minnesota, Atlanta, Houston and New York (both National and American Leagues). And in other instances in actual practice, baseball is given a veto over the selection of the concessionaire, i.e., Cleveland, Philadelphia, Kansas City, Anaheim, San Diego and St. Louis. In 1970, of the 24 stadiums where major league baseball was played, nineteen also staged professional football and in every case the same concessionaire serviced all events, including football, pursuant to a contract with the baseball management, or the stadium owner; and in no case did the concessionaire operate under a contract with a football or other team, except baseball.[8] Only major league baseball receives revenue from

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[7] Professional football enjoys equal coverage but its season is much shorter.

[8] It may be said that this occurs because it would be both uneconomical and impractical to have two concessionaires in the same stadium, arena, etc. because it would require the equipment etc. to be moved in and out of a stadium to serve 8 or 10 football games annually or other events that may come to the stadium from time to time and that, since the baseball concession serves 80 games, it takes over. But the reason is not so simple. For example, when Sportservice went to Kansas City with the 1950 Philadelphia Athletics contract it took over the football concession after football moved to the stadium; likewise Stevens took over the San Francisco 49'ers because of its baseball concession. And Oakland, with four major league tenants in the

(*footnote continues*)

other events staged where it plays. This gives its concessionaires the cream of the concession business, including not only baseball and football but all other events staged in the stadiums where major league baseball is played. This unique situation places the baseball concessionaire in a completely separate economic entity and a unique and isolated relevant market or submarket of the concession business.

(3) Another "marked difference" that the baseball concession enjoys is the "follow the franchise" clause now included in at least seven major baseball concession contracts. It is in five Sportservice contracts and two others (New York Yankees and San Diego, Canteen having the Yanks and Servomation the other). The record here includes 77 concession contracts outside of baseball and not one has such a clause. Sportservice suspects that the clause is used outside of baseball also but it has not found any evidence of it after all these years of litigation. This clause has imbedded Sportservice into the baseball concession business. In at least three instances the clause has been utilized by Sportservice, i.e., Seattle to Milwaukee, St. Louis to Baltimore and in this case.

(4) Sportservice contends that baseball and football concession services are practically identical, and they are alike in "kind." However there are "marked differences" in "degree," as one Sportservice employee testified when he characterized them as "completely different types of operations." See International Boxing Club v. United States, supra, 358 U.S. at 251, 79 S.Ct. 245. Football relies largely for concession sales on the half-time inactivity but it is watered down by the half-time entertainment on the playing field. Baseball, in contrast, has 17 built-in "coffee breaks" in a 9-inning game, plus the "seventh inning stretch," now universal. Additional pauses come when

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(footnote continued)

stadium, gives baseball alone partipation in the concession revenue of the stadium. At Atlanta the baseball tenant receives concession revenue from all events at the stadium and in Washington, D.C., the baseball team received part of the football concession revenue as well as that from baseball. It is no answer to these commercial realities to say it is coindence. Why does the football concessionaire never take over the other concessions when its team moves?

pitchers are relieved, which is becoming more frequent. These differences are reflected in the standard concession bidding formulae which give baseball 80 percent weight. In every major league baseball city, except Oakland, the per capita revenues are higher in baseball. In addition, major league baseball plays ten times more home games on the average than professional football. While, as Sportservice emphasizes, the lowest earning baseball concession is below that of the highest earning football concession, the fact is that the average major league baseball concession earns about twice as much as the average professional football concession. Take the contract of the Houston Astrodome: Its concession contract provides that if for some reason the baseball team moves from the stadium, the guaranteed annual minimum return to the Astrodome is reduced from one million to one hundred and fifty thousand dollars.

(5) The differences between the major league baseball concessions and others become staggering from a standpoint of the capital necessary to secure the contract. In major league baseball the average is about $700,000 while horseracing is less than $200,000, buildings (arenas) less than $70,000 and dog tracks less than $60,000. This does not take into account the so-called "cost of contract," advances, loans, et cetera.

The total (cash, improved or new concession facilities, loans, et cetera) ran as high in major league baseball as $2,500,000 (Milwaukee); $2,000,000 (Atlanta, Montreal, Seattle); $1,500,000 (San Diego, Philadelphia, Anaheim, N.Y. Mets); $1,000,000 (Detroit, N.Y. Yankees, Houston, Cincinnati, St. Louis); $500,000 (Pittsburgh, Atlanta, Los Angeles Dodgers, Chicago $450,000).[9] While some large loans have been made outside of baseball, they have been infrequent. No other sport has consistently experienced such a record of such high expenditures on loans, etc. with such long term contracts. Moreover, I have combed the record carefully and have found no direct payments to any football teams.

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[9] Investments, costs of contracts, advances, loans etc. of less aggregate amount than $450,000 are not listed.

(6) The "marked differences" between major league baseball concession services and those of arenas-stadiums, buildings, dog and horse racing tracks, et cetera, are many. As to the latter, investment, "cost of contract," et cetera, and income is much less. In addition, in actual operation, horse-racing and dog tracks having a much less restricted menu, selling entire dinners, et cetera, as well as liquor. Indeed, Sportservice concedes that the restaurants at these facilities should not be in the relevant market. Nor do these facilities have vendors or hawkers. Personnel is not shifted between baseball stadiums and racetracks, dog tracks, arenas, et cetera, because of differences in operation. The number of spectators is much smaller. The concessionaire does not handle the same package of advertising, score cards, sketch books, novelties, et cetera, as do the baseball ones. In addition, special skills are needed in baseball to accurately estimate attendance, et cetera. Furthermore, the major league baseball concessionaire must handle all events staged in the stadium, including football, rodeos, et cetera. The staff must be more capably trained, carefully selected because of large sums of money involved, et cetera, and paid a higher compensation. Baseball also has a different type or class of spectators. It has more youngsters, ladies and "regulars" than the other sports and, not serving liquor, must develop higher volumes of sales in other products. Mr. Dillon put it well in his testimony:

> "Staffing, organization, manning of that organization, accounting for large sums of money, controls to avoid shortages, you just do not apply a multiplier to a small operation, believe it or not, and expect the fellow who runs the small operation to supply that multiplier and go ahead and do it. In the first place he does not have the ability, he has not got the experience. Men who operate large stadiums are executives, they are good executives. This is not true of men who operate small minor league stadiums."

Sportservice would include 1250 arenas-auditoriums, 850 stadiums, 623 horseracing tracks and 35 dog tracks in the relevant market. The record indicates that the typical stadium

is open 38 days each year, conducts 18 types of events and the average annual attendance is 125,000; the annual revenue from concessions—where available—is an average of 20 cents per capita. The typical auditorium-arena is on a larger scale but as to concessions produces less than 20 cents per capita. Major league baseball produces as much as $1.93 per capita with an average of $1.00 to $1.25 while professional football runs from 85 cents to 95 cents per capita. As to the horserace tracks, Sportservice says that in 1970 its 45 tracks took in 1½ times as much revenue as did its 8 major league baseball concessions (two Sportservice baseball concessions are in litigation, Pittsburgh and Oakland). This means that on the average, each of Sportservice's major league baseball concessions took in four times as much revenue as each horse track. Based on these statistics furnished by Sportservice, one average day's concession receipts at a major league baseball club would produce as much revenue as a whole year in the average stadium; and even horse racing, which Sportservice says produces its highest per capita revenues, requires four racetracks to equal one ball park. Still Sportservice would give these 1250 arenas-auditoriums, 850 stadiums and 623 horse tracks equal weight with major league baseball concessions. The realities of commercial life just do not operate in this fashion. The average percentage of gross revenue paid on non-baseball concession contracts is 23 percent while major league baseball runs 33 percent. The foundation of Sportservice's success as a concessionaire has been bottomed on major league baseball concessions. It is living proof that major league baseball occupies a unique, distinct and separate market. As International Boxing Club v. United States, *supra*, reminds us, the determination of a relevant market "involves distinctions in degree as well as distinctions in kind." At 251, 79 S.Ct. at 251.

Still Sportservice insists that the kind of products, the kind of equipment and the kind of personnel used in an auditorium-arena, a horse or dog track or a stadium concession can readily be interchanged with a major league baseball one.[10] However there is no evidence of any interchange of concession contracts

[10] The testimony is conflicting. On personnel all agree that prior experience in baseball concessions is preferable.

or of cross-elasticity of demand or supply; nor is there any evidence that such a switch would be commercially profitable or economical. Corwin D. Edwards, noted economist, advises us: "The growing use and misuse of the economic concept of the relevant market is a glaring example of infelicitous borrowing . . . Economists worth their salt also realize that, on the supply side of the market, there is a cross-elasticity of supply—that under appropriate incentives the seller may be capable of substituting alternative goods for his present goods, and that the substitutability of goods in the productive process also helps to determine the boundary of the market. The capacity . . . varies with numerous characteristics of the productive process and of the cost structure, as well as with the financing and the contractual arrangements associated therewith, and consequently there are successive gradations in the capacity of the producer to offer alternatives." There is no evidence of any willingness of a concessionaire to trade a major league baseball concession for any other or for a cluster of others; nor is there evidence of a club owner trading his share for a non-baseball concession share. It is only the Sportservice economist who says that it can be done.[11] In so doing, the economist and Sportservice overlook the testimony of those in the concession business for years, and, in addition, they ignore the commands of *International Boxing Club, supra,* that we must consider "distinctions in degree." The latter are overwhelming. The realities of the concession business show that long before the products, the equipment and the personnel can be interchanged—if they ever could be; and there is evidence to the contrary—a concession contract must be secured. In major league baseball this requires an investment alone that averages $700,000, with the "cost of contract," loans, advances, et cetera, on top of investment that runs the total cost up from one million to three million dollars.[12] On the contrary, the record shows

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[11] Sportservice depends heavily upon the testimony of Professor William S. Comanor of Stanford University as to the relevant market, the competitive effect of long term contracts and the tying arrangement issue.

[12] The Sportservice contracts in non-baseball facilities are also burdened with some "cost of contract", loans etc. and long terms ranging from ten to sixty years; contract extensions are also present that are similar to baseball.

that the average investment in horseracing concessions is about $200,000 and it is the highest outside of baseball. The record also shows that concessionaire after concessionaire did its best to break into major league baseball concessions but never made it—unless they had a million or two to put up.[13] Sportservice's expert says that the necessary funds can be borrowed on the concession contract. The evidence is that in the "commercial realities" of banking that cannot be done. Some witnesses told of their efforts to do so and failed. Over the years Sportservice has been the "deep pocket" and it has exacted its toll. The money is not available in normal channels.

Bill Veeck, one of baseball's most colorful and perennial baseball club buyers (with Sportservice putting up the cash) called major league baseball "the best concession sport in the business"; and Arnold Weiss, longtime house counsel for Sportservice added: Major league baseball is "unique, its ownership is unique, its games are unique, it plays its home games in a unique location, its patrons are unique, and an agreement to perform concession services for a major league baseball team is unique. There is a limited, distinct and unique demand for such services and a limited number of customers thereof." Mr. Weiss is right—the concession business of which he speaks is a "limited, distinct and unique" market. I find that major league baseball concessions is the relevant market here.

4. The Policies and Practices of Sportservice:

As has been indicated, Sportservice has followed practices in the major league baseball concession business that are indicative of anticompetitive policies. The record is filled with such activity which began to surface soon after World War II. At that time Sportservice had concession contracts with three indoor facilities, one horserace track, 100 (approximately) minor league baseball concession contracts, three major league

[13] Volume Service was able to secure the Oakland contract from a public authority. It is most unusual in the face of the litigation, but was awarded before baseball came to Oakland. All other concessionaires that have broken into the major league baseball concession business in the last decade have bought their way in and they are few and far between. In 1971 Sportservice still had ten major league contracts tied up.

ones and no dog tracks. The minor leagues were in their decline and Sportservice was anxious to improve its position. It then adopted a policy of aggrandizement toward major league baseball concessions. Its plan was to secure long-term contracts, by making advances, loans, investments, pay-offs. The longest term, at that time, of its concession contracts in the record was five years (Pittsburgh) which was made in 1944; and there is no evidence that it made advances, loans, et cetera, prior to that time. Sportservice secured the following concession contracts in major league baseball on the terms and at the times noted:

(1) *Chicago White Sox, 1945:* The first contract was obtained under the new policy. It contemplated a $308,000 maximum investment and carried a term sufficient to amortize that amount at the rate of $10,000 a year—potentially some 31 years. There followed a series of contracts:

(2) *Cleveland, 1946:* A loan to Bill Veeck[14] of $150,000 by the Morris Plan Bank but guaranteed by Louis Jacobs, as part of the purchase of the Cleveland team, brought an advertising, score card, et cetera, concession to Sportservice for a period of 15 years with automatic renewal so long as the team remained.

(3) *Pittsburgh, 1946:* Sportservice already had the concession but Frank McKinney with his silent partner, Louis Jacobs of Sportservice, bought control of the team (Jacobs put up $330,000). After McKinney took over the management, he needed cash to make improvements. In October, 1946, a five-year extension of the 1944 contract was made with Sportservice, providing for 20 percent of the gross sales for the club. Sportservice agreed to make unspecified expenditures for "various improvements in the refreshment department... with the understanding that our present agreement is after December 31, 1955, to be automatically extended for such further yearly periods as are required to amortize such further expenditures made by us at the rate of $5,000 a year." The

[14] "Veeck—As in Wreck" by Bill Veeck and Ed Linn. G. E. Putnam & Sons, 1962, relates some of the bizarre circumstances of this acquisition. PP. 85-95.

amount of expenditures and, therefore, the number of years was not specified, but the agreement made reference to "at least twenty-five years." McKinney testified that he did not contemplate that the contract would be extended in perpetuity. Prior to selling his and Jacobs' silent interest in 1950, McKinney signed a letter to Sportservice, agreeing that the expenditures up to that time were $254,617.23 which would extend the contract for 51 years. Sportservice now claims expenditure of over $500,000 entitling it to a 100-year extension.

(4) *St. Louis Browns, 1948:* $150,000 loan, purchase of $125,000 equipment; 10 year contract which the club could terminate at the end of 1952 or any subsequent year.

(5) *Detroit (Renewal), 1949:* No payment, loan, advance, etc.; one year term.

(6) *Cincinnati, 1950, (Renewal):* $100,000 investment; 5-year contract.

(7) *Philadelphia, 1950:* Connie Mack and his family had controlled the Athletics since 1902. They were in serious financial trouble. The Athletics owned Shibe Park and the concessions were handled by Mack's son, including both the Athletics and the Phillies baseball clubs. Sportservice had been trying to get the Athletics concession—the only one in the United States that serviced teams from both leagues at the same ball park. On September 25, 1950, Sportservice entered into a 15-year contract with the Athletics and paid the club $150,000 cash, gave a commitment for a loan not exceeding $100,000 and purchased the concession equipment at Shibe Park for an additional $100,000. The Athletics agreed to repurchase the equipment at the end of the contract term for $100,000 but a contract provision allowed the club to escape this obligation by permitting a 10-year extension of the term. The contract provided for a 29 percent share of the gross receipts for the club. Two years later the contract term was extended to 25 years in consideration of the cancellation of the concession equipment repurchase agreement and the renewal of the $100,000 loan commitment. In 1954 the Athletics were sold to Arnold Johnson who moved the Athletics to Kansas City. The Sportservice concession contract went with the club under its

"unaffected by change of ownership" clause. However, it continued in effect as to all other events at Shibe Park, including the Phillies. Mr. Johnson then sold Shibe Park to Robert Carpenter, the owner of the Phillies, who required that the Sportservice contract insofar as it bound Shibe Park be reduced by 8 years. Sportservice required this 8 years to be added to the Athletics' contract term, extending it to a total of 33 years.

(8) *St. Louis Browns, 1951:* Another Veeck transaction in which Louis Jacobs loaned $175,000 to Veeck on condition that within 15 days after buying his part interest in the Browns he would deliver to Sportservice "an exclusive concession agreement satisfactory to (Jacobs) or holder of this note, covering Mission Stadium in San Antonio, Texas, and Sportsmen's Park in St. Louis, Missouri." Sportservice already had a concession with St. Louis. See (4) *supra.* When Veeck got control of the team, the old St. Louis concession contract was cancelled, effective December 31, 1952,[15] a new contract provided for ten years with an option for 15 years additional, the "follow the franchise" clause was clarified, the stadium owners joined in the contract binding its assigns and a clause undertaking to extend the contract to the Cardinals was added. This latter undertaking was accomplished[16] which gave Sportservice 9 major league baseball concessions. At this time Stevens had 4 major league concessions, and the remaining three performed their own.

Veeck moved the Browns to Baltimore[17] in 1953, and Sportservice went with them under its "follow the franchise"

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[15] By agreement of the parties, the 1948 contract was superseded and cancelled effective December 31, 1952, which was 1½ years later. By post dating the effective date of the new agreement to January 1, 1953, this additional 1½ years was added to its term of 25 years [including the option]. The right to cancel which was in the old agreement was eliminated in the new one.

[16] The Cardinals did not capitulate but bought Sportsmen's Park and were caught by the Sportservice contract with the Browns to which Sportsmen's Park was a party.

[17] The American League would not permit Veeck to remain with the team in Baltimore.

clause. It remains in effect until 1977. In the move Sportservice picked up the Baltimore Colts football team pursuant to the custom heretofore mentioned.

(9) *Cincinnati, 1955 (Renewal)*: $25,000 cash and a $50,000 investment; 5 year contract.

(10) *Detroit, 1956:* $500,000 cash, 15-year contract with right in Detroit to terminate after ten years upon payment of $200,000 ($40,000 a year for remaining term).

(11) *Cleveland, 1960:* On competitive bidding for a ten-year contract.

(12) *Washington, D.C. 1961:* Competitive bidding for a ten-year term.

(13) *Los Angeles Angels, 1961:* One-year contract, no payoff, advances, loan, et cetera. Sportservice received reimbursement of its costs, plus rental on its equipment plus 5 percent of gross sales. This gave Sportservice ten of the fifteen major league teams receiving professional concession services. (Three teams—Chicago Cubs, Minnesota and Milwaukee provided their own concessions).

(14) *Chicago White Sox, 1961:* This is Veeck's third deal with Louis Jacobs. $150,000 loan from Jacobs, Sportservice or Emprise with a new concession contract to Sportservice. $200,000 to Chicago *or* $200,000 spent on improvements which became property of Chicago; percentage raised to 30½ percent (Cleveland received 33 percent in 1960 as did Washington D.C. in 1961); follow the franchise clause inserted. After the concession contract was signed, Veeck sold out.

(15) *St. Louis, 1965:* Contract for 30-year term, with $400,000 minimum annual guarantee; $1,400,000 spent on improvements. Only nationally operating concessionaires with financial capacity to make guarantee and expenditure were considered by St. Louis; "the concessionaire would have to be satisfactory to our main tenant, namely The Cardinals Baseball Team" (whom Sportservice then served). However, Sportservice is protected on its guarantee by built-in extensions of the term of the contract if the annual guarantee is not fully earned.

This continued Sportservice's hold on the major league baseball concession services. (Three clubs continued to handle their own service). In 1966 Milwaukee moved to Atlanta and employed ARA's services; and, in 1967, the Phillies' portion of the old Athletics contract of 1950 expired and they awarded the concession to ARA, which left Sportservice with 9 teams out of the 18 serviced by concessionaires. In 1969 four new teams were added to the Leagues. Sportservice obtained two, Montreal and Seattle, which gave them exactly 50 percent of all of the major league baseball concession contracts.

(16) *Montreal, 1969:* $2,000,000 loan (Sportservice had to borrow the money itself at 9 percent interest and loan it to Montreal for 3½ percent); 25 year term at 33⅓ percent. Montreal negotiated with several concessionaires; Restaurant Associates "could not justify the economics of such a loan"; ARA likewise declined. Ogden's Executive Committee offered only a guarantee which Montreal's bank refused. Montreal's McHale, believing Sportservice to be the only company that "would be able to immediately help us" called Sportservice and made the deal by telephone. Sportservice made the funds available that day. Montreal had never played a game of baseball and Canada had never had a major league baseball club; the stadium would only seat 2,000 people but was being expanded to 28,000. But the "follow the franchise" clause is in the contract, and Montreal is building a new stadium. There may be a clash between the City and Sportservice as to honoring the "follow the franchise" clause. McHale depended on baseball being the prime tenant, and the parties had no doubt as to which way the city would go. It wants the ball club.

(17) *Seattle, 1969:* $2,000,000 loan, interest ½ percent over prime 25-year term at 32 percent; $75,000 investment in the temporary stadium and $1 to $1½ million in the proposed new one; and a "follow the franchise" clause. Initially Seattle requested $4 million in loans. Volume Service could not meet the requirements; Restaurant Associates found the loan request "completely unfair"; Canteen had reluctance to get into the investment phase; Ogden met with Seattle 15 to 20 times. The loan phase of the requirements was reduced to $2 million in October, 1968, but Ogden refused; Servomation followed some-

what the same course. Sportservice was the only one left and it "came through." Soon after the Montreal contract was completed, Sportservice contacted Seattle and one or two telephone conversations preceded the final contract in February, 1969. It included commitments that Seattle would not sign a lease for the new stadium unless Sportservice came along as concessionaire, which was no more than what its contract provided.

(18) *Cincinnati revisited, 1969:* Not less than $1,000,000 investment; 15-year term with subsequent agreement to extend to 25 years. Riverfront Stadium in Cincinnati is municipally owned with a lease to the baseball team under which the latter operates the concessions. The team decided to employ a professional concessionaire. The team originally desired a 5 to 10-year concession, but the concessionaires persuaded them to increase it to 15 years. Three concessionaires bid. Sportservice received the contract on the second highest bid. The expenditures Sportservice was obligated to make were "not less than a million dollars." They ran higher. In addition, an electrical power controversy arose before the stadium was completed, and the baseball team asked Sportservice to pay the difference in cost which was nominal, i.e., some $60,000 if done by a certain date. Sportservice indicated it might pay the difference if the term of the contract was extended to 25 years. While the Cincinnati Executive Committee thought "¼ of a century" was long, it agreed to it. Sportservice's final investment commitment was $1,650,000.

(19) *Milwaukee, 1970:* After the Seattle Club took bankruptcy, the team moved to Milwaukee and Sportservice went along under the "follow the franchise" clause. Sportservice had committed itself to a $3 million loan to the ultimate purchaser of the franchise (assumption of the $2 million Seattle loan and an additional $1 million). The additional million was to include the parking and advertising during the term of the concession. When Milwaukee could not secure the parking, the loan was reduced to $500,000. When it came to evicting Ogden—who had a contract on the stadium where the transferred team was to play—the County had to pay Ogden $280,000, to which Sportservice contributed. This gave

Sportservice 25 years at Milwaukee with both the major league baseball team and the Green Bay Packers, which went with it.

(20) *Detroit, 1970:* A $500,000 loan without interest produced a one year extension, effective 1972, with the option in the ball club to renew for 9 additional years. However, if it does exercise its option to renew by October, 1972, Sportservice would make another $500,000 payment and the Club would be entitled to retain an extra 4 percent of gross concession receipts, retroactive to January 1, 1970, the latter being payable October 15, 1972. This would be 4 percent for three full seasons, 1970, 1971 and 1972. On past experience the 4 percent would amount to $400,000 and with the $500,000 cash, payment would total $900,000.

(21) *Chicago, 1970:* $100,000 cash, a loan of $350,000 and a commitment to invest another $100,000; 10 year contract. Sportservice's old contract made by Veeck was to expire December 31, 1970. Sportservice contacted Chicago on September 10, 1970, for a renewal. On September 15 Chicago decided to circulate specifications for the concession to ARA and Canteen. The specifications called for a cash payment of $150,000 and a loan of $250,000. Chicago had scheduled a lunch with Canteen on September 16th. Sportservice called by telephone in the morning of the 16th and was told of the specifications. A deal was made on the telephone for a cash payment of $100,000 and a loan of $350,000. The luncheon with Canteen was cancelled. Thus Sportservice will maintain its exclusive rights with Chicago from 1945 to 1980 while the team has never received a competitive bid. The last extension occurred during a recess of this case and five days after the Court had decided the 1950 contract was binding on Finley, if not in violation of the antitrust laws.

5. The Restrictive Effects of the Contracts:

Various tests of the usefulness or restrictive effects of long-term contracts are laid down in Standard Oil Co. v. United States, 337 U.S. 293, 308, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). Among them are: Has competition flourished despite the restraints; the conformity of the length of their term to the

reasonable requirements of the field of commerce in which they were used; the status of the user as a struggling newcomer or an established competitor; and the degree of market control of the user "for the greater the dominance of his position, the stronger the inference that an important factor in attaining and maintaining that position has been the use of . . . contracts to stifle competition rather than to serve legitimate economic needs." At 308, 69 S.Ct. at 1059.

(a) At the time this suit went to trial, Sportservice had 50 percent of the relevant market in long-term contracts with no term less than 10 years. The reasonable requirements of the concession business do not necessitate such long contracts. The length of the Sportservice contract does not vary in proportion to the size of the investment; recoupment varied from $5,000 to $110,000 annually and length of term was without regard thereto. The long terms served to restrain the market and protect Sportservice's monopolistic position therein. Sportservice always took all that it could and gave only what it must to land the contract. Indeed, the experience of competitors of Sportservice shows that adequate recoupment can be made over much shorter periods (Yankee Stadium, $1,251,000, term 10 years; Anaheim, $1,500,000, 10 years; Houston, $1,200,000, 3-10 years (ARA) and $850,000 on a year-to-year basis (Ogden); Los Angeles $650,000 for 10 years; Kansas City, $385,000, 4 years and Milwaukee $175,000, 3 years). Sportservice itself amortizes its investments, et cetera, over a 7-year tax period.

Moreover, it appears inappropriate to include the cash advances, loans, et cetera, in these tabulations. They are not a legitimate expense. Sportservice since 1950 has included its outright cash payments as "cost of contract" in its accounting system. Mr. Zander, Vice-President of Sportservice, testified that "cost of contract" occurred whenever Sportservice secures a concession contract from a club that owns the facilities at its ball park. It is, he said, simply paying rent for a customer's concession facilities. But examination of each contract shows this is not correct. For example, Mr. Mack (Philadelphia Athletics) owned the concession facilities and sold them to

Sportservice. In its books Sportservice entered the $150,000 it paid Mack in cash as a "cost of contract." It owned the facilities itself. The same is true of the Chicago, Detroit and Cincinnati stadiums where Sportservice had paid for the concession facilities. Rather than "cost of contract" it is a payoff, as in Veeck's transactions, to get the contract. Finally, the degree of market control that Sportservice enjoys creates a strong inference that the long contracts have been an important factor in its success. It is true that Sportservice did not obtain the concession contracts in Atlanta and Houston, but that was because Sportservice had taught its competitors to follow its lead if they wished to break into the market. They only raised the payoff. As *Standard Oil, supra,* points out, the competitors were "struggling newcomers," even though rich ones.

Sportservice also seeks to justify its action by asserting that it was the Clubs that sought long terms. With possibly one exception (St. Louis in 1965) this is not supported in the evidence. Where the Clubs seek enormous sums of money by way of advances, loans, et cetera, they know that such financial arrangements require long terms. However, the record shows the Clubs do not want long terms. Absent the loans, advances, et cetera, all of the terms are comparatively short. Indeed, Sportservice took one for a single year.

The Eastern District of Pennsylvania explained the impact of long term contracts in United States v. Pullman Co., 50 F.Supp. 123 (1943), in these words (at 129):

> "As a competition killer the long term contract is an effective weapon. One could hardly have a more favored service contract than an agreement for exclusive dealing, equipment of one's own choosing and a quarter of a century of time to elapse before one need to be concerned with new terms. Even a patentee is not so secure against a passage of time. Multiply the advantage by the number of railroads with whom Pullman secured service contracts and its position, for the years covered, was impregnable."

This case was cited with approval in *Standard Oil, supra,* 337 U.S. 293 at 308, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). In

fact, long term exclusive contracts have been found to be *per se* violations of Section 3 of the Clayton Act, *Standard Oil, supra,* and Section 5 of the Federal Trade Commission Act, FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426 (1953), if they foreclose a substantial share of the relevant market. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961).

The vices of these contracts need not be belabored. They foreclose competitors for a significant period of years; tie the parties to the contract and prevent them from bettering their position; they beget extensions just as Sportservice has obtained here, thus eliminating further competition. There is nothing theoretical about this. Many concessionaries, this record shows, have been forced to eschew competition in the relevant market despite their qualifications. Long-term contracts also harm the baseball club. After the Phillies broke away from Sportservice they were able to get a 37 percent contract instead of 29 percent.

Furthermore, as is indicated in the contracts listed in *Paragraph 4, supra,* they often have provisions which serve to extend and enlarge the term and coverage of the original contract. For example, when Sportservice is called upon to guarantee a minimum payment, the contract is extended where such payments are made and not earned. Likewise, the monies Sportservice expends on the improvement of facilities, such as the Pittsburgh contract, are amortized at differing rates and extend the contract beyond its stated term. Finally, the St. Louis Cardinals were brought under a Sportservice contract because the owner of the stadium it was purchasing had obligated the stadium to Sportservice at the latter's instance.

(b) The evidence also shows that Sportservice's economic power in the relevant market was not obtained by normal expansion, superior management or an enterprising sales force. In fact, practically all of its contracts were obtained "by deliberate, calculated purchase for control," United States v. Reading Co., 253 U.S. 26, 57, 40 S.Ct. 425, 432, 64 L.Ed. 760 (1920). The use of its large financial resources enabled it to get the unusual contracts it secured. Indeed, the few contracts it

obtained without using its financial muscle were of short term (1 to 10 years) and had none of the earmarks of its purchased contracts. The evidence shows conclusively that its use of financial resources was with intent to secure long term contracts at lower rates and thus restrain, attempt to monopolize and to monopolize the relevant market. Sportservice has made these payments, advances, loans and other financial arrangements not as a banking or financing business, but solely to its concession customers on the absolute condition that Sportservice obtain concession contracts for long terms and at low rates. While concession services and financial accommodations are separate products for antitrust purposes, Sportservice has for a quarter of a century employed its great resources to reduce the ability of other concessionaires to complete in the relevant market and to secure for itself long term, low rate contracts. Its success reveals sufficient power to require major league baseball clubs to purchase its concession services over an excessively long period of time as a condition to securing its financial assistance. This power gives Sportservice unique economic advantages over its competitors by creating artificial barriers to entrance into the relevant market and has unreasonably restrained competition therein—all of which with the specific intent to monopolize that market. As a result, all of the smaller competitors have been excluded, except at public facilities. Likewise, baseball has been harmed because once the club becomes indebted to the concessionaire the quality and performance of the services deteriorates. Moreover, the club is often stuck with the bad contract while an owner like Veeck moves on to greener parks.

(c) The "follow the franchise" provision also acts as a restraint as well as a mechanism to enforce the long term contracts. Wherever the team goes the concession follows; and usually—as in Milwaukee—the transfer also includes all other events staged at the stadium to which the baseball franchise is moved. This is not only unfair to the club but severely restricts competition and supports Sportservice's attempt to monopolize.

Sportservice says the advance or loan is given without strings, but this is hardly acceptable. In the rare cases where the loan, the cash and the concession are not locked together,

they were received with the understanding that best efforts would be exerted to repay the favor. Sportservice also says that this practice is not a barrier to entry into the market unless the capital requirement is $500,000,000. The evidence is to the contrary. Sportservice assumes the concessionaire can borrow the necessary cash from a bank or other loan agency on the concession contract. This is just bunk or pure naiveté. Finally, Sportservice says that the cash and loans are but reflective of a "two-part pricing structure." But it matters not what one labels them, they have unlawful anti-competitive effects and are indicative of a specific intent to violate Section 2 of the Sherman Act. Furthermore, that label is inaccurate where the benefit accrues to someone other than the team.

Finally, Sportservice says that "everybody is doing it." But even so, this does not give Sportservice immunity. United States v. National City Lines, 186 F.2d 562 (7 Cir. 1951), cert. denied, 341 U.S. 916, 71 S.Ct. 735, 95 L.Ed. 1351. Moreover, no competitor has come close to Sportservice's record. There is no evidence that any of the following concessionaires—all competitors of Sportservice—ever made a cash payment or a loan to a major league baseball club: Canteen, Restaurant Associates, Nilon Bros., Volume Service, Cleveland Concessions and Martin. The record shows two large loans were made by competitors of Sportservice. Both were made by large concessionaires new in the relevant market and who were struggling to enter. Both concerns were managed by former Sportservice employees and neither of them has repeated the performance. On the other hand, Sportservice dominates the relevant market and continues to use pay-offs to maintain its position.

6. *The Court finds* that, beginning soon after the end of World War II and continuing to this date, the policy of Sportservice and its specific intent was and is to restrain competition, attempt to monopolize and to monopolize the relevant market in concession services. To effectuate this purpose Sportservice and its affiliated corporations—including Emprise Corporation—have combined and conspired among themselves and others to use their economic resources to provide money, credit and financial accommodation to major

league baseball clubs or their owners on condition that the latter enter into unreasonably long, exclusive contracts with Sportservice for concession services. It was part and parcel of such conspiracy that Sportservice Corporation guarantee the performance of some of the concession contracts, such as the contract involved here; extend loans such as the one to the Seattle Club and become a party to some concession contracts, such as St. Louis. Individuals, such as Bill Veeck, were extended personal loans to buy clubs as a quid pro quo for Sportservice subsidiaries to receive concession contracts. As a result Sportservice has foreclosed a substantial share of the relevant market in violation of Sections 1 and 2 of the Sherman Act. Tampa Electric Company v. Nashville Coal Company, 365 U.S. 320, 329, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961).

7. In the ultimate this case is about the 1950 Philadelphia Athletics contract as described in *Section 4(7), supra.* The court finds the term of this contract unreasonably long in its original form and highly anti-competitive upon the addition of the ten and eight-year provisions (totalling 33 years); that the "follow the franchise" provision was and is unique and together with the term unreasonably restrains trade and was used in an attempt to monopolize and to monopolize a substantial segment of the relevant market.

Sportservice seeks to excuse its conduct by comparison with the Stevens N.Y. Giant contract. This is not a legal defense in any event. However, on the facts, the two situations are in no wise comparable in term, conditions, automatic extensions or club coverage (the 1950 Philadelphia contract covered two clubs in the same park).

8. *The Court finds* that at the time of the making of the 1950 Philadelphia Athletics contract described in *Section 4(7), supra,* the Athletics had exhausted its borrowing power with financial institutions, its franchise was in serious financial trouble and, by 1952, had so worsened that "the Philadelphia Athletics would have been left to die—no one daring to inject it with the financial transfusion which it so desperately needed." Sportservice brief.

9. The "Tie-In" Violation Under Fortner v. United States:

Finley also claims that Sportservice has tied the sale of credit and financial arrangements to the sale of concession services in violation of the doctrine of Fortner v. United States, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969). It is not necessary to pass upon this question since we find other violations of both Sections 1 and 2 of the Act that are not *per se* illegalities, as is a *Fortner* situation.

Sportservice has a novel theory on which it seeks to escape this *per se* violation. It says that the sale of the concession service is a franchise made by the team as seller and is paid for by the concessionaire as buyer through a "two part price structure." The cash payments, loans, et cetera, are the first part and the percentage on gross sales the second one. The Court is of the opinion that the concessionaire is the seller and the tied product is the concession service while the tying product is the cash payments, advances, loans, et cetera, both going from the concessionaire to the club; in consideration of this the concessionaire gets the exclusive concession contract which gives him the right to perform the services and receive his per cent of the gross sales.

Sportservice does not agree, claiming that the loans, irrespective of their interest rate, are gifts or "payment in kind." If this is true, then "credit" could never be a tying product and *Fortner* is wrong. Not being able to assume that, at least while sitting here, the Court cannot agree. Nor are the services of the concessionaire rendered to the spectator in the ball park as Sportservice claims. The service is purchased by the club from Sportservice and Sportservice is acting for the club in selling the hot dog to the Club's guest. Hence, the Court finds that the club is the purchaser and the concessionaire the seller of the services. Louis Jacobs himself said that Sportservice renders a service to the clubs it serves. Jerry Jacobs, presently President of Sportservice and son of Louis, says:

> "Well, actually, our policy is to give service to our customers. And embodied in that might be advances or loans, depending on their requirements, at their request."

Even trial counsel for Sportservice answered the inquiry of the Court as to whether Sportservice rendered a service: "Just like everybody else, Your Honor . . . Everybody provides a service in that we do something they don't have to do." Official after official of concessionaires said that they "provide a service." And stadium managers and operators said the concession is "an agreement of service . . . a very simple relationship of services provided for money . . ." (Liegler of Anaheim). The Montreal Club official said the team "is purchasing management and the concessionaire is providing a service to the ball club." In public bidding, the specifications are sent out to the concessionaires who sell the type of service called for by bidding or making an offer to sell services which is accepted or rejected. Moreover, the club maintains some controls over the service, i.e., the quality of food, efficiency, hours of work, number of stands and type, prices charged, et cetera. These vary from concession to concession. It seems clear that what the club is purchasing is service or management, in order to be relieved of the chore of handling its own concessions. Rather than considering what function is performed, Sportservice looks at "who pays whom." This emphasis is unrealistic. It is true that the concessionaire collects for the hot dog and sends the club its percent. But this is unimportant. The concessionaire is merely a conduit between the purchaser of the hot dog and the club; the latter's percent attaches the minute the hot dog is sold.

There remains the question of whether Sportservice has sufficient market power to make its financial arrangements serve as an effective lever. This is a question of fact and the Court finds that Sportservice has sufficient power and that the amount of commerce affected is not "insubstantial." In each instance, at the time of the making of the contract (whether it be Connie Mack's 1950 one in Philadelphia or the Montreal or Seattle one), the respective club had exhausted its credit. Sportservice was the only line of credit left to the club. As Mr. Ehlers of the Philadelphia Athletics testified (on the 1950 contract involved here):

> "If it hadn't been for Sportservice advancing that money, the Macks would have been out of business and would have lost everything . . . Stevens (another concessionaire)

wouldn't give us anything. But these people would give us this money to tide us over, to get us on our feet . . . We needed money."

In view of these circumstances the Court finds Sportservice guilty of a *per se* violation of Section 1 of the Sherman Act. This finding is merely cumulative of the previous ones.

10. The 1950 Contract is Unenforceable.

A motion was heretofore made by Sportservice to strike Finley's antitrust defense based on the principle that courts will not enforce illegal contracts. On May 1, 1968, Judge Peckham denied the motion. I take this ruling to be the law of the case. However, in an abundance of precaution, the Court notes his agreement with Judge Peckham.

As early as 1909 in Continental Wall Paper Co. v. Louis Voight & Sons, 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486 the Court held that where enforcement of a contract would give direct sanction to an illegal restraint under the Sherman Act the Court would not permit it. Here Sportservice seeks to enforce the unexecuted portion of an illegal agreement. Sportservice makes no contention that Finley has failed to meet any of its obligations under the contract prior to the commencement of this action.

A failure to recognize this long established defense would serve to frustrate the Sherman Act and render it impotent. The Courts will not lend their processes to such a purpose. The contract involved has already enjoyed a tenure of 17 years and would run for 16 additional years if this defense is stricken here.

Sportservice cites Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959), as contrary. The Court finds it inapposite. There a contract for the sale of onions had been completely performed, save for the payment. Justice Holmes, in his usual pungent style, articulated the overriding general policy of "preventing people from getting other people's property for nothing when they purport to be buying it." 212 U.S. 271, 29 S.Ct. 296. That policy controlled the *Kelly* case. No such policy is involved here. Indeed the shoe is on the other foot.

Nor is Sportservice afforded any defense by reason of its claims that some of the contracts involved in its acquisitions were entered into with a public or governmental body or as a result of competitive bidding and, therefore, are exempted from the antitrust laws. The law is to the contrary. See Hecht v. Pro-Football, Inc., 144 U.S.App.D.C. 56, 444 F.2d 931 (1971).

11. Damages:

Finley is entitled to recover its damages, the measure of which is the difference between what it would have received had there been no illegal restraints and what is actually received under the 1950 contract. The damage period is four years which narrows our measurement to the four baseball seasons 1964 to 1967, both inclusive.

It is always difficult to assess damages in an antitrust suit. However the problem here is not so difficult as in other cases where comparisons are not available. Here we have major league baseball contracts as well as bids that are helpful in our determination. The 1960 contracts in Cleveland and Washington, D.C., both Sportservice, each paid a 33 percent return; and in 1963 the Sportservice St. Louis contract carried the same figure. The Oakland bid of Volume Service in 1965 carried 35 percent, while Atlanta in 1965 with a $2,600,000 loan from ARA drew 39 percent plus a profit-sharing arrangement. In 1966 Cincinnati received 35 percent from Sportservice. In 1967 ARA gave the Connie Mack Stadium in Philadelphia 37 percent. It is the same park in which the 1950 contract allowed the Athletics 29 percent. In 1969 Montreal drew 33⅓ percent, Seattle 32 percent and Cincinnati 33.2 percent, all with Sportservice. In 1968 Kansas City—the same park involved here—had four bids ranging from 33 percent to 38 percent. B & L, which is 50 percent Sportservice owned, bid 33.2 percent with a $401,000 annual guarantee, while Ogden bid 33 percent with an annual guarantee of $236,000. Ogden was awarded the contract. The Court has considered all of the statistics and arguments of the parties and finds that the acts of Sportservice were the proximate cause of the injury to Finley and fixes the damages at $282,168.00 for the four year damage period. This

amount will be trebled according to law. In addition Finley is entitled to reasonable attorneys fees which will be fixed by the Court.

12. The injunction heretofore issued will be dissolved.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action.

2. The counter-defendants have violated both Section 1 and Section 2 of the Sherman Act.

3. Counter-plaintiff has been proximately injured by the Counter Defendants' violation of the Sherman Act and is entitled to money damages in the amount of $282,168.00, to be trebeled according to law.

4. The contract of September 25, 1950, is unenforceable and Counter-plaintiff is entitled to no relief thereunder.

FINAL JUDGMENT ORDER

This cause having been tried to the Court without a jury; the Court having heard the testimony, having read the documentary evidence and having considered the memoranda and arguments of the parties,

It is hereby ordered, adjudged and decreed as follows:

1. The order for preliminary injunction hereinbefore entered is hereby set aside and the preliminary injunction heretofore issued pursuant to said order is hereby dissolved.

2. The findings of fact and conclusions of law embodied in the Court's Amended Memorandum of Decision dated September 29, 1972 are hereby adopted and entered.

3. The contract claims of the Plaintiff-Counterdefendant Twin City Sportservice Inc. against the Defendant-Counterclaimant Charles O. Finley and Company, Inc. are

denied on the affirmative defenses interposed by Defendant-Counterclaimant based on the federal antitrust laws as are set up in its answer; and Plaintiff-Counterdefendant's complaint is hereby dismissed with prejudice.

4. With respect to the issues tendered by the first amended counterclaim of Defendant-Counterclaimant Charles O. Finley and Company, Inc. hereinbefore filed and the answers thereto of the Plaintiff-Counterdefendants, Judgment is entered in favor of the Defendant-Counterclaimant Charles O. Finley and Company, Inc. and against the Plaintiff-Counterdefendants, Sportservice Corporation and Twin City Sportservice Inc. in the amount of $846,504, plus reasonable attorneys' fees and costs to be determined by subsequent order of the Court.

5. The amended second and third counterclaims filed by the Defendant-Counterclaimant Charles O. Finley and Company, Inc. are hereby dismissed.

6. In light of the delay on the determination of the reasonable attorneys' fees to be allowed in order to afford the Plaintiff-Counterdefendants time to have discovery they deem necessary thereto, the Court expressly determines that there is no just reason for further delay in the entry of this Judgment and directs that it be entered forthwith.

APPENDIX F

SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1

Appendix F

15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX G

SECTION 2 OF THE SHERMAN ACT, 15 U.S.C. § 2

Appendix G

15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX H

SECTION 4 OF THE CLAYTON ACT, 15 U.S.C. § 15

Appendix H

15 U.S.C. §15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX I

BAYOU BOTTLING, INC. V. DR. PEPPER CO.

NO. 790253, SLIP OPINION
(W.D. LA. JULY 15, 1982)

Appendix I

United States District Court

FOR THE WESTERN DISTRICT OF
LOUISIANA LAKE CHARLES DIVISION

Civil Action No. 790253

BAYOU BOTTLING, INC. VS. DR. PEPPER COMPANY AND
COCA-COLA BOTTLING CO. OF LAKE CHARLES, INC.

Slip Opinion

July 15, 1982

COUNSEL:

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OPINION BY: VERON

OPINION:

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EARL E. VERON UNITED STATES DISTRICT JUDGE

The plaintiff in this case, Bayou Bottling, Inc., (Bayou) has brought suit against defendants, Dr. Pepper Company, (Dr. Pepper) and Coca-Cola Bottling Co. of Lake Charles, Inc. (LCC), pursuant to §§4 and 16 of the Clayton Act (15 U.S.C. Sections 15, 26), charging the defendants with violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) and Section 7 of the Clayton Act (15 U.S.C. §15) in the amount of $45,000,000.00, as well as court-ordered divestiture under 15 U.S.C. §26. Following extensive discovery by both sides, the defendants have filed this motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56(c), contending that there is no genuine issue as to any material fact, and that the defendants are entitled to judgment as a matter of law. After hearing oral argument on this motion on April 29, 1982, the court took the matter under advisement and requested the submission by the parties of proposed findings of fact and conclusions of law. Having painstakingly considered the reams of memoranda submitted by the parties, in addition to the sometimes confusing but always artful argument of the distinguished counsel in this case, the court is now ready to rule.

This case is somewhat unusual, in that the defendants, hoping to once and for all slay the behemoth which this lawsuit has come to resemble, have chosen to concede many of the facts alleged by the plaintiff, for purposes of this motion only. Should the motion be denied, either in whole or in part, many (if not most) of the proposed findings of fact submitted by the plaintiff would become the subject of vehement dispute at trial. However, in urging their right to summary judgment, the defendants have assumed the position that Bayou Bottling cannot be entitled to judgment as a matter of law, even if all the facts alleged by the plaintiff were true.

The facts giving rise to this case had their genesis more than seven years ago, when the hands of time laid their steely grip on Mr. Lloyd Wilcox. Wilcox, owner of the local Dr Pepper bottling plant, was approaching retirement age and had decided to sell his operation. Two prospective buyers, LCC and Bayou, were waiting eagerly in the wings. The following facts relative to the events which later transpired are uncontested.

UNCONTESTED FACTS

1. The parties: Plaintiff, Bayou, is a Louisiana corporation with its principal place of business in Jennings, Louisiana. Bayou is in the business of wholesaling and distributing soft drinks in the Lake Charles/Jennings area. Bayou carries several soft drink brands, of which the two biggest sellers are Pepsi-Cola and Seven-Up.[1] Bayou is now the sole owner (since 1975) of Central Bottling Corporation, which produces the bottled soft drinks distributed by Bayou. Bayou also owns six percent of the stock of Coastal Canning Corporation, a cooperative of Pepsi bottlers which produces Bayou's canned soft drinks. The current owners of Bayou purchased the business in December of 1976 for the price of $300,000.00, to be paid over a ten-year period. Bayou does business in the Western District of Louisiana.

Defendant Dr Pepper is a Colorado corporation with its principal place of business in Dallas, Texas. Dr Pepper is in the business of manufacturing soft drink "concentrate" for Dr Pepper and Sugar Free Dr Pepper soft drinks. Dr Pepper distributes its product by means of giving licenses, or franchises, to local bottlers, who use the concentrate in the manufacture of the finished product. Local bottlers set prices and determine marketing strategy, and are free to sell other brands, provided they are not classified as "imitators" of Dr Pepper. Dr Pepper does business in the Western District of Louisiana.

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[1] Other brands Bayou sells are Diet Pepsi, Pepsi Lite, Mountain Dew, Sugar Free Seven-Up, Lipton's Iced Tea, Lipton's Diet Iced Tea, Nesbit Strawberry, NuGrape, Delaware Punch, Dad's Rootbeer, Sunkist Orange, Royale Chocolate, and Country Time Lemonade. In addition, Bayou also sells Dr Pepper and other products in fountain syrup form.

Defendant LCC is a Louisiana corporation with its principal place of business in Lake Charles, Louisiana. LCC, a licensee of the Coca-Cola Company and, since 1976, a licensee of defendant Dr Pepper, produces and sells several soft drink brands in its franchise area.[2] LCC does business in the Western District of Louisiana.

2. Relevant product and geographic markets: For purposes of this motion, the parties agree that the relevant product market is that of "soft drinks"[3], and that the relevant geographic market is the area of southwest Louisiana encompassed by LCC's Dr Pepper franchise.

3. Nature of the industry: The soft drink industry makes extensive use of what is known as the franchise system. The captains of the industry are the manufacturers of the different flavor extracts which are also referred to as "syrups" or "concentrates." For example, the Coca-Cola Company, PepsiCo, Inc., Seven-Up Company and Dr Pepper license the use of their product names and sell their flavor extracts to bottlers under franchise agreements which give the franchisee the exclusive right to wholesale the soft drink in packaged form within a specific geographic area. The flavor extracts are also sold in fountain syrup form. Two of the parties in this case, LCC and Bayou, occupy the position of wholesalers, and they compete against each other, and with private label and warehouse brands, for sales to retailers.[4] Once sold to retailers, all

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[2] LCC sells Coca-Cola, Sprite, TAB, Fanta flavors, Fresca, Dr Pepper, Sugar Free Dr Pepper, Welch's flavors, Barq's Rootbeer and Nestea Iced Tea.

[3] For purposes of this motion, soft drinks are defined as non-alcoholic, non-dairy beverages for human consumption, which are manufactured by addition of a flavored extract to water (usually carbonated), and purchased by the retail customer in consumable form, predominantly packaged in bottles or cans but also dispensed in non-packaged form.

[4] "Private labels" are soft drinks sold by grocery chains under their own trade name or the trade name of the organization from which the retail grocer purchases. The soft drinks are manufactured by the grocery chains themselves or by contract bottlers or canners. Some of the better known private labels include Cragmont (Safeway), Chek (Winn-Dixie), Gayla (Topco), Yukon (A&P), 7-11 (Southland) and Big-K (Kroger). "Warehouse

(*footnote continues*)

brands compete against each other at the "shelf" level for consumer acceptance.

The parties agree that the wholesaling of soft drinks is a "high volume" operation. That is, costs of production and distribution may be reduced by a higher volume of output. Profits are increased by the "economies of scale" resulting from reduction of unit cost by increasing output without a comparable increase in production and distribution expenses.

It is a common practice for a wholesaler to hold franchises from more than one nationally advertised brand. Dr Pepper is, comparatively speaking, a smaller concentrate manufacturer than, for example, Coca-Cola or PepsiCo. In 1978, no bottling company in the United States produced only Dr Pepper, and only 30 bottling plants produced Dr Pepper as their primary product. As a result, Dr Pepper must seek out local bottlers of other brands who are willing to take on their product.

4. The scenario prior to the sale of the Wilcox franchise: In 1974, there were two Dr Pepper bottlers in southwest Louisiana: one owned by Mr. Clyde Johnson in Lafayette, the other owned by Wilcox in Lake Charles. Both men were approaching retirement age and, by February of 1975, both had discussed the possibility of selling their franchises with Mr. Donald L. Antle, Vice-President, in charge of franchises for Dr Pepper. The parties agree that Wilcox was not, at this time, aggressively marketing his product, and that his plant was in need of substantial capital improvements. Nonetheless, there were two parties that were extremely interested in the acquisition of this ailing business, both of whom felt that they could breathe new life into it. These two prospective buyers were, of course, LCC and Bayou.

Wilcox and Johnson negotiated with both LCC and Bayou relative to the sale of their respective franchises, and it is also

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(*footnote continued*)

brands" are soft drinks that are sold through regional warehouses by the manufacturer and which bypass the more common method whereby the concentrate manufacturer sells to a bottler who manufactures the finished product and sells to retail outlets in his local area. The best known warehouse brand is Shasta.

conceded that Mr. Antle took an active role in these negotiations. Both LCC and Bayou were interested in obtaining the Wilcox operation so as to increase their cost efficiencies, thereby bringing a concommittant increase in profits. As for Dr Pepper, the parties agree that this company was interested in having the franchises sold to the local Coca-Cola bottler.

Bayou's board of directors adopted a resolution formally declaring the corporation's intention to acquire the Wilcox operation. Bayou made an oral agreement with Wilcox to buy his business for a price of $1 million on April 23, 1975. Further discussions were had early in the day on April 25, 1975, but later that day Antle, Wilcox, and representatives of LCC confected a binding written agreement for the sale of Wilcox's business to LCC for $1 million. Although Antle preferred that Johnson also sell his franchise to the Coca-Cola bottler for the Lafayette area, Johnson had already accepted $100,000 in earnest money from the Lafayette Seven-Up/Pepsi bottler, Central (an affiliate of Bayou), and Johnson sold his business to them. The franchise was later assigned to Acadiana Bottling Company and approved by Dr Pepper.

As stated earlier, the policy of Dr Pepper favored the combination of Dr Pepper with Coca-Cola bottlers in southern Louisiana, and Mr. Antle encouraged both Wilcox and Johnson to sell their respective franchises to the Coca-Cola bottlers in their area. In the case of Wilcox's franchise, Antle had his wish; in the case of Johnson's franchise, he did not. In other words, the defendants concede for purposes of this motion that Dr Pepper encouraged Wilcox to sell to LCC and not to Bayou. However, the court finds that the plaintiff's proposed finding of fact that there was a conspiracy between Dr Pepper and LCC to prevent Bayou from acquiring the Wilcox franchise, directed at restraint of competition, to be merely conclusionary in nature. It is however, an undisputed fact that LCC's acquisition of the Wilcox franchise foreclosed Bayou from obtaining a Dr Pepper franchise for the same marketing area.

5. Effects of LCC's acquisition of the Dr Pepper franchise on the relevant market:

a. Bayou instituted a lawsuit in the Fourteenth Judicial District Court of Calcasieu Parish on May 23, 1975, seeking specific performance of the alleged contract of sale entered into with Wilcox on April 23, 1975. Since the pleadings admitted that no written agreement had been confected (and, indeed, counsel for the plaintiff admitted in oral argument that many of the terms of the sale were yet to be resolved), the state court dismissed Bayou's claim on September 26, 1975, finding that it was barred by the Louisiana Statute of Frauds. No appeal was taken, but LCC's acquisition of the franchise was held in abeyance pending the outcome of the litigation, until June 3, 1976.

b. For purposes of this motion, the defendants concede the validity of certain market share figures propounded by the plaintiff. According to these figures, Wilcox's franchise enjoyed a 30% market share prior to the purchase by LCC; LCC enjoyed a market share of some 45-50%; Bayou claimed a mere 20% of the market, and all other remaining brands accounted for less than 5% of the market. Therefore, after the purchase of Wilcox's business, LCC's market share was between 75-80%, and Bayou's was 20%.

c. Vending machines and coolers: Defendants also concede for purposes of this motion that, subsequent to the acquisition, LCC outnumbered Bayou in vending, machine sales by a ratio of 5 to 1. (Bayou's figures indicate that Bayou has 523 vending machines and 167 coolers, and that LCC has 2891 vending machines and 521 coolers.) It is also undisputed for our purposes today that LCC does not permit store owners to place Bayou's products in LCC-owned vending machines and coolers, and that LCC provides free maintenance service for store owners only when those machines are stocked exclusively with LCC products. Bayou also provides free vending machines to store owners.

d. Shelf space: The shelf space allocated to the different soft drink manufacturers is determined, ultimately, by the retail store owner or manager. However, soft drink suppliers are allowed to arrange their products themselves, subject only to the supervision of the store operator, and space is generally

accorded each supplier based on the proportionate market share of their product. Therefore, it is conceded that LCC occupies 75-80% of the available shelf space in retail stores, and that Bayou obtains 20%.

e. The Pepsi Challenge: Both Bayou and LCC sell their soft drink products in a large number of packages, including 12-ounce cans and returnable and nonreturnable bottles in the following sizes: 6½-ounce, 10-ounce, 16-ounce, 28-ounce, 32-ounce and 48-ounce. In 1973, Bayou Bottling was the first in the Lake Charles area to introduce the 32-ounce returnable/resealable bottle, offering a discount on such packages of Pepsi and Seven-Up of $0.50 off its normal wholesale price. In November of 1974 (prior to the acquisition by LCC of the Wilcox operation), defendant LCC introduced its own 32-ounce returnable/resealable package of its corresponding products, Coca-Cola and Sprite. Beginning in June, 1975, LCC offered these products at a discount of $1.00 per case in the Lake Charles marketing area. This discount remained in effect until January 3, 1977.[5]

f. Mr. PiBB: The concentrate for Mr. PiBB is manufactured by the Coca-Cola Company. In an attempt to obtain a franchise for a soft drink in the same "flavor category" as Dr Pepper, Bayou repeatedly applied for a franchise to distribute Mr. PiBB. The Coca-Cola Company refused Bayou's requests, on the ground that such franchises were only granted to Coca-Cola bottlers. LCC does not market Mr. PiBB in the Lake Charles area, because of its agreement with Dr Pepper not to sell another soft drink in the same flavor category as Dr Pepper. (Mr. PiBB is marketed by LCC in the Lafayette area, where they do not have a Dr Pepper franchise.) The national Coca-Cola Company is not a party to this suit.

g. Dr. Nut: In 1976, having been unable to obtain a franchise for either Dr Pepper or Mr. PiBB, Bayou's owners

[5] On a full line basis, LCC's average total costs per case of soft drinks sold in its Lake Charles and Jennings marketing areas were $2.36 in 1974, $2.79 in 1975, $2.73 in 1976 and $2.87 in 1977. LCC's average revenues per case in those areas were $2.62 in 1974, $3.18 in 1975, $3.23 in 1976 and $3.30 in 1977.

attempted to develop and sell their own entrant in this flavor category: Dr. Nut. In April of 1978, Dr. Nut, Inc. reapplied for federal trademark registration unsuccessfully. Dr. Nut, Inc., then failed a complaint in federal district court for the Western District of Louisiana for damages incurred as a result of this opposition. The case was settled and dismissed. In 1981, sales of Dr. Nut were discontinued, and Dr. Nut, Inc. is now in the process of being wound up.

Based on the above undisputed facts, the court now makes the following CONCLUSIONS OF LAW

1. Propriety of granting the motion for summary judgment:

The plaintiff in this case has offered argument in support of the proposition that summary judgment is particularly inappropriate in antitrust cases. However, as the plaintiff quite correctly states in its proposed findings of fact and conclusions of law:

Summary judgment may be granted in antitrust cases, as in other cases, where there is no genuine issue of material fact and it is clear that the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c); Aladdin Oil Co. v. Texaco Inc., 603 F.2d 1107, 1111-1112 (5th Cir. 1979). Nevertheless, as pointed out in II Areeda & Truner, Antitrust Law, §316 at 58:

Any discussion of summary judgment must, of course, recognize that it is often inappropriate. The Supreme Court said that it should be used sparingly in antitrust cases. And it is not a substitute for trial. All ambiguities and all reasonable inferences, it is frequently said, must be resolved in favor of the party against whom summary judgment is sought. And it is also said that the claimant need not, at the outset, submit probative evidence in support of his position. The moving party has the burden of showing on the basis of admissible evidence, from persons with personal knowledge of the facts, that there is no genuine issue for trial as to any material fact.

The authors go on to say that mere allegations in a complaint or defensive pleading are insufficient to resist summary judgment and that the party opposing the motion must offer probative evidence to support his claim. In a recent case, Southway Theatres, Inc. v. Georgia Theatre Co., 5th Cir., No. 80-7672, decided April 5, 1982, the Fifth Circuit provided an informative discussion on the standard for summary judgment in antitrust cases. It is proper for the court to make some assessment of the inferences that the plaintiff wishes to be drawn from the circumstantial evidence.

The party opposing a motion for summary judgment is entitled to the benefit only of reasonable inferences that may be drawn in its favor... Some scrutiny is thus required to determine whether the facts are susceptible of the interpretation which Southway (the plaintiff) seeks to give them in light of the defendants' evidence contradicting Southway's allegations. . . .

This court has previously described the proper extent of a court's assessment of the inferences in this matter:

> insofar as any weighing of any inferences from given facts is permissible, the task of the court is not to weigh these against each other, but rather to cull the universe of possible inferences from facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do.

(citations omitted)

See also, In Re Municipal Bond Reporting Antitrust Lit., 5th Cir., No. 80-2013, decided April 5, 1982, and Carlson Mach. Tools, Inc. v. American Tool, Inc., 5th Cir., No. 81-2462, decided June 23, 1982.

This court has long been of the opinion that summary judgment should be used sparingly in all cases, and it is only with great caution and much soul-searching that such motions will be granted by this court.

2. The court's analysis: The court is now of the opinion that the lengthy history and heated debate engendered by this

lawsuit are due to the fact that the opposing parties have diametrically opposed theories of this case. On the one hand, the plaintiffs are of the firm belief that their allegations, if proved, establish violations of the antitrust laws, and that they are therefore entitled to compensation for any and all injuries which would not have been suffered but for such alleged violations. The defendants, on the other hand, theorize that the antitrust laws are designed to afford redress for only certain kinds of injury, and, although the fortunes of plaintiff's business may have suffered through the success of defendant's operation, the antitrust laws afford plaintiff no right to relief, let alone relief in the magnanimous form of treble damages. In an effort to answer the plaintive cries of both sides, the court will attempt to examine each allegation of anticompetitive conduct, determine its merit, and then address the question of whether the kind of injury alleged to flow from such conduct is within the protection of the antitrust laws. The court is by no means so naive as to believe that both sides will be satisfied with the result of its analysis, but it is hoped that plaintiff and defendants will agree that the court has adequately considered, if not concurred with, their reasoning.

3. The accumulation of franchises: The major thrust of the plaintiff's argument seems to be that the acquisition by LCC of the Wilcox Dr Pepper franchise made LCC a monopolist in the soft drink industry in the Lake Charles marketing area, as evidenced by certain anticompetitive effects on such market. Bayou claims that the merger of the Dr Pepper franchise with LCC was anticompetitive because, had Bayou, rather than LCC acquired the franchise, the market shares of the two Lake Charles wholesalers would have been nearly equal, thereby fostering competition.

The accumulation of several exclusive franchises does not necessarily operate so as to restrain trade. The defendants suggest an analogy between this case and two Third Circuit decisions: Lawlor v. National Screen Service Corporation, 270 F.2d 146 (3rd Cir. 1959), and Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3rd Cir. 1981).

In Lawlor, the plaintiff and the defendant were in the business of distributing advertising accessories to movie theatres. The defendant had acquired exclusive franchise agreements with the eight leading motion picture studios, giving them the sole distribution rights for all films produced by these studios. The court found no antitrust violation. The plaintiffs were free to compete for the acquisition of the exclusive franchises, when they became available, and there was no restraint of trade or reduction in supply due to the aggregation of several franchises by the defendant.

Similarly, in the Fleer case, the court found no unreasonable restraint of trade. The defendant Topps had an agreement with the Major League Baseball Players Association giving them the exclusive right to distribute bubble gum with baseball cards depicting the various players. The court discussed the Lawlor case, above, noting:

> . . . This court held that an accumulation of exclusive licenses is not a violation of the Sherman Act because a rival film accessory distributor could always compete against National Screen for subsequent contracts with motion picture producers. Similarly, in our case, Fleer or any other trading card manufacturer, may compete with Topps for minor league players or even persuade the present major league players not to renew their Topps' contracts. In keeping with this line of reasoning, the court found no antitrust violation because competition in the relevant product market (which the court identified as "pocket size pictures of active major league baseball players, sold alone or in combination with a low cost premium, at a price of 15 to 50 cents") was not foreclosed.

However, these two cases involve a characteristic not present in the instant lawsuit.

In both cases, the licenses involved products which do not compete against each other. Hence their accumulation does not prevent a rival manufacturer from entering the market and does not operate as a restraint of trade. 658 F.2d at 150 (emphasis added)

For example, each motion picture involved in the Lawlor case used different accessories, not useful for the promotion of other films; each player's trading card in the Fleer case was distinct from every other's. A poster advertising Gone With the Wind does not compete with one advertising Star Wars, and a Ron Guidry baseball card does not compete with a Reggie Jackson baseball card. Here, however, Dr. Pepper, Coca-Cola, Sprite, Pepsi, and 7-Up all compete against each other for the consumer's taste buds. Therefore, the court feels that the reasoning of these two cases is not directly analogous to our situation.

Of much greater interest to the court is the case of Top-All Varieties, Inc. v. Hallmark Cards, Inc., 301 F.Supp. 703 (S.D.N.Y. 1969). The plaintiff in that case owned a chain of retail stores, including one about to open in Tarrytown, N.Y. Hallmark entered into an agreement with another retail store in Tarrytown (Stationer's), to the effect that only Stationer's would be allowed to handle the Hallmark line. The court dismissed plaintiff's case for failure to state a claim upon which relief could be granted, stating that:

While Hallmark is alleged to be the largest producer of greeting cards in the U.S., the complaint recognizes that there are other competing manufacturers who can supply Top-All with such products. It is alleged that Hallmark cards are the leading brand of greeting cards and that customers wishing to purchase them will take their business only to a store handling Hallmark products. But this does not make the exclusive distributorship invidious or unlawful.

There is no claim here that there is not a substantial market for the sale of cards produced by Hallmark's competitors . . . Thus the plaintiff does not allege that interbrand competition is affected in any way by the Hallmark exclusive distributorship arrangements with Station's. (emphasis added) The court went on to distinguish the case at bar from that of Klor's v. Broadway-Hale Stores, 359 U.S. 207, 79 S Ct. 705, 3 L.Ed. 2d 741 (1959).

The Klor's case involved a conspiracy between a large number of nationally known appliance manufacturers and

distributors and Broadway-Hale Stores, a retail distributor of appliances and a competitor of Klor's, to refuse to sell to Klor's or to sell only at discriminatory prices. There are indications that Broadway-Hale extracted the agreement by use of its monopoly buying power. Thus the Klor's case involved a predatory conspiracy with both horizontal and vertical elements directed at a single competitor with the purpose of driving that competitor from the field by foreclosing all sources of supply. 301 F.Supp. at 705.

The conclusion of the court, therefore, is that the agreement between Dr Pepper and LCC to join hands against Bayou was not, standing alone, in restraint of trade or anticompetitive in effect. Though Bayou does not now compete on an equal footing with LCC, they do nonetheless compete. The retail store owner (and the consumer) is not hampered in his freedom to choose between LCC's products and Bayou's by the bare fact that LCC holds the Dr Pepper franchise. We will look, therefore, to the plaintiff's allegations of anticompetitive effects of the accumulation of the franchises, for the mere fact that they have been accumulated is insufficient to establish the plaintiff's right to recover.

4. Anticompetitive effects

a. In its first allegation of anticompetitive effects of the acquisition, the plaintiff cites:

> Foreclosure from marketing Dr Pepper, with resulting loss of the cost efficiencies Bayou Bottling would have derived from increased volume, loss of profit from increased past and future sales, including loss of sales of Dr Pepper and loss of increased sales of its other brands due to the improved ability to price them more competitively. As to future sales, Bayou Bottling's claim may be expressed either in terms of discounted present value or loss of present capital value—i.e., difference in value of the business as it is versus what it would have been had the antitrust violations not occurred.

The question is whether Bayou's loss of business and cost efficiency due to LCC's acquisition of the Wilcox franchise

indicates an anticompetitive effect of such acquisition. The defendants submit that this and other allegations of injury fail the test of Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). Since the Brunswick case is so important to our decision today, the court finds it expedient to discuss it in some detail.

The defendant in that case was one of the two largest manufacturers of bowling equipment in the United States; the plaintiffs were three bowling centers owned by Treadway Companies, Inc. To combat increasing financial difficulties caused by a decline in the bowling industry, the defendant instituted the practice of acquiring operating defaulting bowling centers when their equipment could not be resold and a positive cash flow could be expected from operating the centers. The size of the defendant's operation increased, until they had over five times as many centers as their next largest competitor. The plaintiffs claimed that the acquisitions in their market areas might substantially lessen competition or tend to create a monopoly in violation of §7 of the Clayton Act, 15 U.S.C. §18. Damages were sought pursuant to §4, 15 U.S.C. §15, for three times "the reasonably expectable profits to be made (by respondent/plaintiffs) from the operation of their bowling centers." 429 U.S. at 481.

The court stated the theory of the plaintiffs' case as follows:

To establish a Section 7 violation, respondents sought to prove that, because of its size, petitioner had the capacity to lessen competition in the markets it entered by driving smaller competitors out of business. To establish damages, respondents attempted to show that had petitioner allowed the defaulting centers to close, respondents' profits would have increased.

Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents most prove more than that petitioner violated §7, since such proof establishes only that injury may result. Respondents contend that the only additional element they need demonstrate is that they are in a worse position than they would have been had petitioner not com-

mitted those acts. The Court of Appeals agreed, holding compensable any loss "causally linked" to "the mere presence of the violator in the market." 523 F.2d, at 272-273. Because this holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so, we cannot agree with it.

Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holding, once a merger is found to violate §7, all dislocations caused by the merger are actionable regardless of whether those dislocations have anything to do with the reason the merger was condemned. This holding would make §4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws.

Both of these consequences are well illustrated by the facts of this case. If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet respondents' injury--the loss of income that would have accrued had the acquired centers gone bankrupt--bears no relationship to the size of either the acquiring company or its competitors. Respondents would have suffered the identical "loss"--but no compensable injury--had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents, as the Court of Appeals itself acknowledged, 523 F.2d at 279. Thus, respondents' injury was not of "the type that the statute was intended to forestall."

But, the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of competition, not

competitors.". It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

Of course, Congress is free, if it desires to mandate damages awards for all dislocations caused by unlawful mergers despite the peculiar consequences of so doing. But because of these consequences, "we should insist upon a clear expression of a congressional purpose," before attributing such an intent to Congress. We can find no such expression in either the language or the legislative history of §4.

To the contrary, it is far from clear that the loss of windfall profits that would have accrued had the acquired centers failed even constitutes "injury" within the meaning of §4. And it is quite clear that if respondents were injured, it was not "by reason of anything forbidden in the antitrust laws"; while respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful.

We therefore hold that for plaintiffs to recover treble damages on account of ????? 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to caused.

(citations omitted, footnotes omitted)

429 U.S. at 486-489.[6]

Brunswick, therefore, established a bifurcated test for the allowance of damages in an antitrust action: 1) the injury must flow from that which makes the defendants' acts unlawful, and

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[6] It is with reluctance that the court has quoted so extensively from this case, but to have deleted a portion of the quotation would have resulted in failing to set forth a full explanation of the ruling in the case at bar.

2) the injury must be the type of injury that the antitrust laws were intended to prevent.

The plaintiff's first allegation of injury stems from its failure to acquire the Dr. Pepper franchise. However, like the plaintiffs in the Brunswick case, Bayou would have suffered this injury no matter who acquired the franchise, or if it had not been sold at all. While no one denies that Bayou is in a less desireable position due to its inability to acquire Wilcox's business, this can only be described as a hazard of the marketplace, and not the type of injury the antitrust laws were designed to prevent. Neither facet of the Brunswick test is satisfied. First of all, Bayou's lost revenues do not flow from the fact that LCC holds such a large market share, but from the fact that they were unable to purchase the business in question. Secondly, these lost profits and cost efficiencies were not the type of injury the antitrust laws were designed to prevent. These laws were intended to protect competition, but to hold that this loss evidences an anticompetitive effect of the defendant's actions would be to protect competitors, not competition. And that we cannot do. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1961).

b. Bayou's next allegation of antitrust injury is stated as follows:

> Foreclosure from marketing other drinks in the same flavor category: the nationally advertised and promoted Mr. PiBB, or in the alternative Dr. Nut, with resulting losses in cost efficiencies, volume, sales, profits and capital value similar to those in subparagraph (a), and its expenses incurred in attempting to promote Dr. Nut.

The court finds that this claim of anticompetitive injury can be resolved without resort to antitrust law. With respect to the inability to obtain a franchise for Mr. PiBB, suffice to say here that all parties admit that the decision to grant franchises for this product only to Coca-Cola bottlers is a unilateral decision of the national Coca-Cola Company, which is not a party to this suit. Further, although it is apparent to the court that the failure of the attempt to promote Dr. Nut was in no way attributable to any anticompetitive conduct by the parties to

this lawsuit, the court is precluded from considering this question by the principle of res judicata, since Bayou and Dr. Pepper have already resolved this matter by means of settlement.

c. Bayou further alleges antitrust injury in the following manner:

> Lost sales, volume and profits from vending machines and coolers, as a result of LCC's market dominance in respect to these and of LCC's acquisition of Dr. Pepper, and of its enhanced power to exclude and actual exclusion of Bayou Bottling products from LCC-supplied vending machines and coolers, plus lost sales volume and profits generally as a result of the related effect on brand loyalty for Bayou Bottling's products vs. LCC's products.

"A monopolist may not take measures with the purpose of preventing effective competition; it may, however, aggressively compete in the marketplace." Superturf, Inc. v. Monsanto Co., 660 F.2d 1275, 1280 (8th Cir. 1981).

These vending machines and coolers bear the trademark of the soft drink company that places them, and are used as a promotional tool by both LCC and Bayou. The fact that LCC excludes Bayou's products from its coolers cannot be said to be anticompetitive conduct. Rather the court views this as the expected result of healthy competition. This is the only reasonable inference. Even a monopolist is allowed to meet competition by promoting its own product.

Northeastern (the plaintiff) suggests that a monopolist's efforts in meeting competition are to be condemned unless they are intended to promote consumer welfare. While it is a fundamental tenet of antitrust law that customers will benefit from the salubrious effects of competition, a monopolist's right to compete is not limited to actions undertaken with an altruistic purpose. Even monopolists must be allowed to do as well as they can with their business. Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 93 (2nd Cir. 1981), cert. denied 102 S.Ct. 1438 (1982), citing Buffalo Courier-Express, Inc., v. Buffalo Evening News, Inc., 601 F.2d 48, 55 (2nd Cir.

1979). See also, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979). In short, it cannot be said that the antitrust laws require LCC to assist Bayou in the promotion of their own product.

d. In their forth allegation of antitrust damages, the plaintiff cites:

> Lost sales, volume and profits as a result of the LCC acquisition of Dr. Pepper, its enhanced power and its exercise of that power in respect to shelf space, increased flexibility in promoting specific products on the shelf and related point of sale promotion.

Again, the allocation of shelf space by store managers, in proportion to market share simply does not reflect an anticompetitive effect of the acquisition of the Dr. Pepper franchise. The defendants have answered this charge with a simple, common-sense analysis of the question, which is of great appeal to the court:

> Plaintiff's allegation with regard to shelf space is that LCC obtains 75 to 80 percent of the shelf space at retail outlets while Bayou obtains only 20 percent. Since these figures correspond to what Plaintiff claims are the two companies' market shares, LCC's advantage in shelf space is precisely what would be expected from non-predatory competition. Moreover, Bayou concedes that that shelf space decisions are ultimately made by the store managers themselves. Thus, Bayou appears to be saying not only that it is entitled to more shelf space than its sales warrant, but that LCC should somehow compel store managers to give preference to its competitor's wares. The antitrust laws compel no such result.

e. The next antitrust injury alleged by plaintiff is:

> Lost sales, volume and profits as a result of LCC's predatory pricing and LCC's enhanced power to engage in predatory pricing the to its acquisition of Dr. Pepper.

The court has carefully examined Bayou's claim of predatory pricing and has found it to be without merit. The court

has first analyzed the facts concerning such claim as alleged by the plaintiff. First and foremost among them is the fact that the discounted 32-ounce returnable bottle was first introduced in the Lake Charles area by Bayou. Bayou admitted to having great success with this package. In response to this "challenge" from the Pepsi bottler, LCC then introduced its own 32-ounce bottle at an even lower price.

It seems to the court that this response by LCC typifies the aim of the antitrust laws. The consumer reaps the benefit of lower prices when competitors vie for greater market shares in the age-old method of offering a comparable product at a lower cost. Plaintiff, on the other hand, contends that this pricing procedure was predatory in two respects: 1) that the effect of LCC's $1.00 per case discount was to put the price of these products below LCC's $1.00 average variable cost; and 2) that the discount was discriminatory because it applied only in LCC's Lake Charles and Jennings marketing areas, not in its Lafayette marketing area.

The court is compelled to agree with the defendants that where, as here, both LCC and Bayou sell a full and widely varied line of soft drinks, in all forms of packages, it is appropriate, in determing whether an item is sold below average variable cost, to look to the average variable cost of the entire line of products, and not just the sale of Coke and Sprite in 32-ounce bottles. The prohibition against predatory pricing is meant to insure that the defendant, at the least, "sacrificed present revenues for the purpose of driving (a competitor) out of the market with the hope of recouping the losses through subsequent higher prices." International Air Ind., Inc. v. American Excelsior Co., 317 F.2d 714, 723 (5th Cir. 1975), reh. and reh. in banc den. October 8, 1975. However, active competition, including price rivalry, is to be encouraged.[7]

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[7] That legal standard, however, must be applied with a practical understanding of business realities. Even legitimate price decreases will necessarily have a non-remunerative effect upon other firms in the market. These decreases will reduce competitors' profit margins and they may drive the inefficient firm out of business while the firm which originally reduced prices continues to make a profit. It is the very nature of competition that the

(*footnote continues*)

Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 855-56 (9th Cir. 1977); see also A. H. Cox & Co., v. Star Machinery Co., 653 F.2d 1302, 1307 (9th Cir. 1981).

The court is well aware that the practice of fixing the price of certain items below cost as "loss leaders" serves the purpose of attracting customers and encourages the consumer to sample the product. This practice is readily distinguishable from that of a monopolist operating its business at a loss so as to drive a competitor from the marketplace, thereby enabling the monopolist to gouge the consumer with ever-higher prices, free from the restraints of competition.

The court adopts the reasoning of the Ninth Circuit in Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), cert. den. 439 U.S. 829 (1978), wherein the court stated:

> ...The pricing of one size at a predatory level would not necessarily drive out rivals who were selling a full line, as is the case in this industry, unless this placed the overall price of the line at the predatory level. Yet there was no evidence that the entire line was so priced for the years in question. 570 F.2d at 856.

Since the plaintiff has not alleged that the defendant LCC sold its entire line of products below their average variable cost, and since the price cut came in response to a discount offered by Bayou, the court is of the opinion that the only reasonable inference which may be drawn from the undisputed facts is that there has been no predatory pricing, but rather that the consumer benefited (albeit at Bayou's expense) from LCC's attempt to regain the share of the market lost to Bayou.

(*footnote continued*)

vigorous, efficient firm will drive out less efficient firms. This is not proscribed by the antitrust laws. "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." . . . Thus we must exercise great care in differentiating between legitimate price competition and that "predatory pricing" which constitutes a restraint of trade.

In any event, the claim of predatory pricing cannot scale the hurdle erected by Brunswick, supra. The fact is that the so-called predatory pricing began more than a year previous to LCC's acquisition of the Wilcox franchise. Therefore, it cannot be said that any injury to Bayou "flowed" from an antitrust violation.

f. Bayou's final allegation of antitrust injury is phrased as follows:

> Lost sales, volume, cost efficiencies, profit and ability to grow, market and promote existing and new products, due to the fact that Bayou Bottling must compete with a monopolist, particularly a monopolist which has a franchise extending into two marketing areas (both the Lake Charles marketing area and the Lafayette marketing area), has a "deep pocket" allowing it to spend whatever is necessary to counter any promotional activity Bayou Bottling may attempt, can afford the extra personnel to engage in various promotional activities and supply equipment to a degree with which Bayou Bottling cannot compete, and which has and exercises the power to perpetuate and exacerbate its large volume advantage and Bayou Bottling's corresponding unit cost disadvantage.

The court has scrutinized this allegation of injury and/or the anticompetitive effects of the Wilcox acquisition by LCC with a discerning eye. The gist of this (and the entirety of plaintiff's complaint) seems to be simple: LCC's gain is Bayou's loss. Bayou laments not only the fact that they were unable to buy the Dr. Pepper franchise; but also the fact that the franchise was acquired by their arch rival—LCC. It is the opinion of the court that this quixotic tilt at the windmill of competition demonstrates that the plaintiff is seeking relief which the antitrust laws simply are not designed to provide.

It cannot be gainsaid that:

> [f]rom the time of the seminal antitrust decision, Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), only reasonable restraints of trade have been held to be proscribed by the Sherman Act.

Sports Center, Inc. v. Riddell, Inc., 5th Cir. No. 80-3302, decided April 22, 1982, citing National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); Chicago Board of Trade v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1978).

Bayou has failed to demonstrate to this court any facts which could give rise to a reasonable inference that LCC's market dominance is the result of willful acquisition of monopoly power. Although it is unfortunate from Bayou's standpoint that there are more residents in the Lake Charles area who believe that "Coke is it" and/or choose to "be a Pepper" than those desirous of accepting the "Pepsi Challenge" or "feeling 7-Up," there has been no showing that the parties market shares are the product of price fixing and/or exclusion of competition by LCC, as opposed to a superior product and/or business acumen.

It is not the duty of this court to require store owners to accord greater shelf space to a less popular product, to force LCC to promote their competitor's wares in their own vending machines and coolers, to forbid the Dr. Pepper company from encouraging alignment with the most efficient bottler willing to purchase their franchise, to dictate the policy of the national Coca-Cola Company in the granting of its franchises, to underwrite the excursions into the marketplace of new products (Dr. Nut), or to prohibit LCC from underselling its competitors. In short the court is not obliged, under the facts of this case, to engage in affirmative action. In each request, Bayou asks the court to protect a competitor, not competition.

We find the record to be devoid of evidence of intent to bring about a monopoly. Monopoly is the power to fix prices and exclude competition. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). Competition is alive and well in the Lake Charles soft drink industry; the consumer is given a wide range of choices in selecting his desired beverage. The court cannot force him to choose a brand for which Bayou holds the franchise. The fact is that Bayou possesses the same market share as they did prior to the acquisition.

"Legitimate competition cannot anchor an antitrust action." In Re Municipal Bond Reporting Antitrust Litigation, 5th Cir., No. 80-2013, decided April 5, 1982. Bayou would have suffered the same lost revenues and cost efficiencies no matter who acquired the Dr. Pepper franchise. Bayou's injuries do not flow from the fact that LCC has a greater market share; they flow from the fact that competition has precluded Bayou from achieving the position they desire. This is not the type of injury that the antitrust laws were designed to prevent, even if a violation of such laws were shown.

Many of the cases cited by the plaintiff involve suits brought by the government to enjoin the merger of businesses on the ground that such merger might operate so as to restrain trade. However, this is a suit by a private plaintiff, and Section 4 of the Clayton Act is a remedial statute providing treble damages to any person "who shall be injured in his business or property by reason of anything in the antitrust laws." Therefore, the plaintiff must show actual injury attributable to something the antitrust laws were designed to prevent, as opposed to the burden in a Section 2 claim, which only requires a showing that such injury might result. Brunswick rejected the idea that mere violation of Section 7 of the Clayton Act gives rise to a damages claim under Section 4. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561-563 (1980). Proof of antitrust injury is an essential element of the plaintiff's claim; absent such proof, plaintiff can claim no relief. There is no need to consider whether there were violations of the antitrust laws if there is no antitrust injury. Purex Corp. v. Proctor & Gamble Co., 664 F.2d 1105 (9th Cir. 1981); Cal. Computer Products v. Intern. Business Machines, 613 F.2d 727 (9th Cir. 1979).[8]

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . .

This statute confers standing to sue only upon those persons causally injured by antitrust violations. . . . Moreover,

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[8] Section 4 of the Clayton Act, 15 U.S.C. §15, authorizing private antitrust suits for damages, provides in part:

in order to prevail the plaintiff must prove not only injury causally linked to the asserted violation, but also that the injury is the type the antitrust laws were intended to prevent. . . . The plaintiff's burden of proving the former is satisfied by proof of some damage flowing from the antitrust violation. . . . Satisfying the latter burden is dependent on a showing that the injury was caused by a reduction, rather than an increase, in competition flowing from the defendant's acts, since "[t]he antitrust laws . . . were enacted for 'the protection of competition not competitors,' ". . . . Accordingly, the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor. . . . Moreover, it is not sufficient for an antitrust plaintiff to allege an indirect ripple effect. As this court wrote in John Lenore & Co.:

> It is not enough to confer standing that plaintiff just prove some injury and show that this injury is within the affected area of the economy. Antitrust violations admittedly create many foreseeable ripples of injury to individuals, but the law has not allowed all of these merely affected by the ripples to sue for treble damages.

550 F.2d at 499. (citations omitted, footnotes omitted). Cal. Computer Products v. Intern. Business Machines, 613 F.2d 727, 732 (9th Cir. 1979).

The court went on to state, at p. 735-36:

> There are three essential elements to a successful claim of Sec. 2 monopolization:
>
> a) the possession of monopoly power in the relevant market;
>
> b) the willful acquisition or maintenance of that power; and
>
> c) causal "antitrust" injury.
>
> There are four elements to a successful claim of Sec. 2 attempt to monopolize:
>
> a) specific intent to control prices or destroy competition with respect to a part of commerce;

b) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose;

c) a dangerous probability of success; and

d) casual "antitrust" injury.

Since the court is able to dispose of this matter for the above stated reasons, the court finds it unnecessary to address the defendants' other defenses (particularly those which are peculiar to Dr. Pepper alone), although the questions raised seem to the court to be meritorious.

In conclusion, therefore, the court finds that the defendants' motions must be granted for the reason that the plaintiff has failed to provide any evidence from which a reasonable inference could be drawn that any injury casually related to an antitrust violation has been suffered by the plaintiff. Pretermitting the question of whether the acquisition of the Wilcox franchise by LCC might operate so as to restrain trade, this paper chase is nonetheless at an end, since the plaintiff is unable to establish the above stated essential element of its claim.

For the reasons above stated, the defendants' motion for summary judgment should be, and hereby is GRANTED.

APPENDIX J

STATEMENT REQUIRED BY RULE 28.1

Appendix J

Statement Required by Rule 28.1

Twin City Sportservice, Inc. is a wholly-owned subsidiary of Sportservice Corporation which is a wholly-owned subsidiary of Delaware North Companies, Incorporated. The following is a list of less than wholly-owned subsidiaries and affiliates of Sportservice Corporation:

AUD Club, Inc.
B & L Concessions of Louisiana, Inc.
B & L Concessions, Inc.
Dominion Leisure Services, Inc.
Race Track Concessions, Inc.

The following is a list of less than wholly-owned subsidiaries and affiliates of Delaware North Companies, Incorporated:

Aluminum Smelting & Refining, Inc.
Arizona-New York Harness Racing, Inc.
Canandaigua Enterprises, Inc.
Centennial Turf Club, Inc.
Dome Associates, Inc.
Jefferson Downs, Inc.
Kentucky Jockey Club, Inc.
Letheby & Christopher (Br.)
Oceanic Butler, Inc.
Pacific Recreation Centers
Rocky Mountain Quarter Racing Association, Inc.
Safety & Health Associates, Inc., and
D.P.N.J., Inc.
Southland Holding Corp.
Southland Racing Corp.
Syracuse Mile, Inc.
Western Pioneer, Inc.

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No. 82-396

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TWIN CITY SPORTSERVICE, INC., et al.,
Petitioner,

vs.

CHARLES O. FINLEY & COMPANY, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The questions stated by petitioner are not truly presented by this record since:

1. The courts below gave proper attention to the anticompetitive impact of the acts and practices found to constitute an unreasonable restraint of trade.

2. All elements of an attempt to monopolize were made out by the evidence; the finding of that violation did not depend upon indulgence in any presumption.

3. Damages were awarded to compensate for antitrust injury which was sustained in fact; those damages were calculated on a proper basis and were not awarded "automatically". Moreover, the issues raised by the petition regarding injury and damages were not presented below.

PARTIES INVOLVED

Charles O. Finley & Company, Inc. ("Finley") has no parent, subsidiary or affiliate corporations. Following adoption of a plan to liquidate Finley, the individual respondents*, as its shareholder-distributees, were added as additional parties by an agreed order entered in the Court of Appeals.

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* Charles O. Finley, Shirley M. Finley, Charles O. Finley, Jr., Paul M. Finley, Sharon Kessling and Kathryn Perlmutter.

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ABBREVIATIONS AND TERMS USED IN THIS BRIEF

"Sportservice"—

Although used throughout in the singular, this term includes the entire "Sportservice System", a group of over a hundred corporations headed by Emprise Corporation. Emprise owns the stock of Sportservice Corporation, which owns the stock of the petitioner, Twin City Sportservice, Inc. The latter is the successor in interest of Penn Sportservice, Inc. Each of the above corporations, and their subsidiaries, affiliates, officers and agents, are covered by the term "Sportservice".

"Athletics Contract"—

The contract upon which the original complaint was based, being an agreement dated September 25, 1950 and all amendments or modifications thereof.

"94a"—

An example of a reference to a page of the Appendix in this Court (here p. 94).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TWIN CITY SPORTSERVICE, INC., et al.,
Petitioner,

vs.

CHARLES O. FINLEY & COMPANY, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Omitted from mention by petitioner are unreported memorandum opinions issued by the District Court on July 20, 1979 and March 31, 1980. For the most part, those opinions dealt with issues pertaining to relevant market, interest and attorney's fees—matters not raised by the petition and thus not relevant here. But a portion of the July 20, 1979 opinion made corrections to findings set forth in the opinions dated March 31, 1977 and December 28, 1978 which are reproduced by petitioner as Appendix B and Appendix C, respectively (43a-76a).

Since those corrections provide the predicate for the 24% market share referred to by the Court of Appeals (6a, 11a, 12a), the relevant portion of the July 20, 1979 opinion is reproduced as Appendix K to this brief.

STATEMENT OF THE CASE

The judgment below is supported by a voluminous record[1] compiled at separate bench trials before two different judges: Justice Tom C. Clark, who entered judgment for Finley in 1972, and Chief Judge Robert F. Peckham, who entered judgment for Finley in 1979.

The necessary starting point for consideration of the petition is a reading of the multiple opinions of the courts below (1a-128a, 160a-161a), commencing with Justice Clark's 1972 opinion (94a-128a). The latter opinion is of special significance because key findings and conclusions stated therein were incorporated by reference in the opinion of Judge Peckham[2]. After independently reviewing the prior record together with the additional evidence adduced before him, Judge Peckham was in "complete agreement" with the incorporated portions of Justice Clark's opinion[3]. 53a n. 2; 58a n. 12.

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[1] The record includes more than 7,800 pages of transcript, developed through the testimony of 58 witnesses over 39 trial days held during the past 15 years; and approximately 1,000 exhibits, most of which are multi-page and many of which are complete volumes in themselves.

[2] Judge Peckham also incorporated significant segments from trial court briefs filed by Finley (53a n. 3; 54a n. 8, 9; 55a n. 11; 58a n. 12) which also were before the Court of Appeals.

[3] The Court of Appeals noted the continuing relevance of Justice Clark's findings. (23a n. 13). And, it was Justice Clark's opinion which first fixed Finley's single damages at $282,168—an amount with which Judge Peckham agreed and which constituted the basis for the final judgment below. 58a.

The opinions below portray the nature and history of the case and provide a full background for consideration of the petition. But the tenor of the petition requires clarification of the setting in which this litigation commenced.

Finley never has entered into a concession contract with anyone[4]. It purchased the Athletics in 1961, when the team was playing in Kansas City and concessions were being handled pursuant to the 1950 Sportservice contract involved in this litigation[5]. When Finley moved the team to Oakland in 1967, the local stadium already was encumbered with a concession contract which the municipal authorities had awarded to Volume Service Company in 1966 following competitive bidding[6]. Since Volume and Sportservice both claimed contract rights as to the same stadium, litigation followed. Sportservice instituted this action in an effort to oust the incumbent concessionaire, to follow the Athletics baseball franchise to Oakland, and to stay there for 16 more years.

At the time this action was commenced, the Athletics' Contract already had enabled Sportservice to enjoy the benefits of performance over 34 baseball seasons[7]. Sportservice claimed

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[4] Thus, Sportservice is doubly inaccurate in suggesting that Finley has sold its concession rights twice (Petn. 2, 5).

[5] Since Finley was not a party to the Athletics Contract, it is absurd to characterize that agreement as Finley's "freely bargained contractual obligation" (Petn. 5).

[6] It is simply not true, as Sportservice states (Petn. 3), that Finley "entered into a new contract with the concessionaire who was then operating at the Oakland Stadium". See 79a, 96a.

[7] Pursuant to the Athletics Contract, Sportservice had served at 17 seasons for the Phillies National League team in Philadelphia, 4 seasons for the Athletics American League team in Philadelphia, and 13 seasons for the Athletics in Kansas City.

another 16 years because its "follow-the-franchise" provisions[8] had the effect of allowing the stated contract term of 33 years to cover 50 baseball seasons[9], as well as professional football and all other events conducted at the stadia to which the contract could be attached.

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[8] According to the petition, Sportservice's follow-the-franchise provisions merely permit a concession contract to remain in effect when a team moves (Petn. 3, n. 1). But they do much more. Sportservice obtains the equivalent of lien rights with respect to the stadium at which a team is operating at the time of the original concession contract. When a team moves, Sportservice stays on at the original stadium and *also* moves with the team to the new stadium. These provisions serve to make two contracts out of one. The Athletics contract enabled Sportservice to control the stadia in both Philadelphia and Kansas City.

[9] 17 seasons for the Phillies and 33 for the Athletics.

REASONS FOR DENYING THE WRIT

This case presents no question of national importance. Its impact is limited to the immediate parties, and the Court of Appeals expressly declined to formulate a decision of broader applicability (22a, 24a). The courts below did not purport to establish any new rule of law or to depart from any old ones. While Sportservice contends that certain existing decisions of this Court were not properly applied, it does not seriously suggest that any new waters need be charted.

As the voluminous record attests, this case was fought in the trenches on a fact-by-fact basis. It was decided on a factual basis. It presents no question of law which, if resolved in favor of Sportservice, could change the result below without further detailed consideration of the particularized facts. Those facts already have been found twice, separately and independently but with identical results, by two highly respected trial judges. And, after two appeals, not one of the eight federal judges below has been able to identify a single procompetitive aspect of the acts and practices of Sportservice. On the contrary, there has been no dissent from the most condemning finding of all, first made by Justice Clark in 1972, that the conduct of Sportservice over a period of more than 25 years has been in furtherance of a specific intent to restrain and to monopolize. 119a-122a.

The two Sherman Act violations established below are challenged separately in the first two parts of the petition. But, if the ultimate result as between the parties is to be altered, it would be necessary to set aside *both* violations. For the damages sustained by Finley were the same, whether resulting from violation of Section 1, Section 2, or both.

The third part of the petition, relating to injury and damages, is not worthy of consideration. Apart from their lack of merit, the issues there discussed were not raised below.

I.

THERE IS NO NEED OR REASON TO REVIEW THE FINDING OF UNREASONABLE RESTRAINT OF TRADE, WHICH WAS FULLY WARRANTED BY THE RECORD AND IN ACCORD WITH SOUND ANTI-TRUST ANALYSIS

Contrary to the contentions of Sportservice, the courts below did not ignore impact on competition[10] in finding a violation of Section 1 of the Sherman Act. Nor did the finding of that violation follow from a "merely mechanical" application of a quantitative substantiality test (Petn. 6-8). It is undisputed that the blanketing of 24% of any market with exclusive contracts satisfies any quantitative requirement under the "substantial share" test of *Tampa Electric*. But the courts below, applying the rule of reason, relied on a host of additional factors as well.

In sum: Sportservice, the largest concessionaire in the world, has locked up 24% of a unique market (comprised of a limited number of individual monopolies) for unreasonably long periods of time through exclusive contracts which were procured through the predatory use of its deep pocket, through conspiratorial conduct, and through the use of deceptive and restrictive contractual provisions, including its "follow-the-franchise" clauses. In all of this—in attaining and enhancing its dominant position over a period of more than 25 years—Sportservice has been driven by a specific intent to restrain trade. It has succeeded in blocking competition by restraining its competitors as well as the parties with whom it deals. No attempt has been made to show that the acts and practices of Sportservice promote competition, and the few

[10] Each of the courts below was keenly aware of the tests established by *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320. Indeed, Justice Clark authored that opinion. Thus, the opinions below are replete with passages in which anticompetitive impact was expressly considered and discussed. See, e.g., 10a, 12a, 13a, 18a, 19a, 26a, 27a, 48a, 51a, 52a, 54a, 55a, 57a, 89a-91a, 116a-112a.

lame excuses offered for its conduct have failed to withstand scrutiny by the courts below. These are the cumulative findings which must be overcome in order for Sportservice to prevail.

Sportservice strives to single out particular factors underlying its Section 1 liability and to argue, at one point or another, that each such factor constituted the sole basis for Finley's recovery. But the case was presented to, and decided by, the courts below on the basis of the aggregate of circumstances presented by the record. No reported decision has allowed an antitrust defendant to escape under comparable facts. There is no conflict among the circuits as to any issue presented, and there is no need to clarify any prior decision of this Court. This case involves nothing more than the application of classic rule of reason analysis to the particular facts. These observations remain true even if each factor underlying liability is examined separately.

Nature of the defendant. Established for more than 60 years, and with concession revenues in excess of $100,000,000 per year, Sportservice is the world's largest concessionaire and is "dominant" in the marketplace. See 52a, 53a, 57a. The record unequivocally supports the conclusion that Sportservice has attained its dominant position through the use of "contracts to stifle competition rather than to serve legitimate economic needs". *Standard Oil Co.* v. *United States*, 337 U. S. 293, 308.

Special nature of the market. The number of available concession franchises is limited. "This is not a situation where by the nature of the market there is room for newcomers, irrespective of the existing restrictive practices." *Federal Trade Commission* v. *Motion Picture Advertising Company*, 344 U. S. 392, 395. Moreover, each franchise itself constitutes a monopoly. Once obtained, there can be no competition for the business opportunity presented thereunder until the contract expires. Control over 24% of such a market is vastly more dangerous than control over a similar percentage of retail

outlets for consumer goods or a similar percentage of product sales. In the latter cases, competitors remain free to capture all or any part of the market at any time through competition as to price, quality, quantity or service, and a market share present today literally can disappear tomorrow. Here, in contrast, the market position of Sportservice is not subject to the vagaries of continuing competition.

Contract length. If long term contracts used by other parties in other settings are proper and commonplace as the petition suggests (pp. 8-9), they are not threatened by the opinion below. The Court of Appeals emphasized that it was not condemning the length of contracts not before it, and was not suggesting that any particular contract length is *per se* unreasonable. See, e.g., 13a-14a, 22a, 24a. But, even though the findings below concerning unreasonable contract length cannot be applied generally in other litigation, they clearly were warranted as between the parties here. Whether one focuses on the 33 year term of the Athletics Contract (covering 50 baseball seasons) or on its other contracts, ranging up to 100 years, the length of Sportservice contracts is ridiculous. The long term is the trademark of Sportservice and the key to its position of dominance. Yet such terms are not required for any legitimate business purpose; neither now nor at any time in the history of this litigation has there been even a lawyer's explanation as to why such long terms are necessary.

This Court has pointed to contract length as an indicator of illegality.[11] There can be no debate as to applicable standards:

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[11] "Likewise bearing on whether or not the contracts were being used to suppress competition, would be the conformity of the length of their term to the reasonable requirements of the field of commerce in which they were used." *Standard Oil Co* v. *United States*, 337 U. S. 293, 308. This classic statement was supported by approving reference to the passage from *United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E. D. Pa. 1943), *aff'd.*, 330 U. S. 806, quoted by Justice Clark at 118a.

the test is clear; the courts below simply found that Sportservice has failed it. In other cases, this Court has condemned, or approved condemnation of, contracts of far shorter duration than are involved here.[12]

Anticompetitive effects. With the execution of each of its contracts, the competitive position of Sportservice became impregnable as to the franchise there involved. Multiplied by the number of its contracts, and then by the number of years for which each monopoly was locked up, the system has resulted in an irretrievable reduction of competition. The foreclosed share must stay beyond the reach of competition for a generation or two. Meanwhile, the long term relationship provides Sportservice with unique ability to procure renewals and extensions without the intrusion of competition, and the operation of its follow-the-franchise provisions serves to enlarge the scope of the contracts already captured. At the same time, as Sportservice enjoys immunity from competition for existing accounts, it remains free to enhance its market share by locking up additional franchises at the expense of competitors who are either unable or unwilling to emulate its practices.

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[12] See, e. g., *Federal Trade Commission* v. *Motion Picture Advertising Company*, 344 U. S. 392, 394 (system of exclusive contracts running up to 5 years, the majority being for 1 or 2 years, held to violate the Sherman Act because "unduly restrictive of competition when they extend for periods in excess of one year"); *Schine Chain Theaters* v. *United States*, 334 U. S. 110, 118 (franchise agreements running for 2 or 3 years held to be unreasonable restraints); *United States* v. *Grinnell Corp.*, 384 U. S. 563, 578 (5 year contracts observed to "constitute substantial barriers to competition" and thus relief on remand to be fashioned to deprive them of "the coercive power that they apparently have had towards restraining competition"); *United States* v. *Standard Oil Company of California*, 362 F. Supp. 1331, 1341 (N. D. Cal. 1972), *aff'd.*, 412 U. S. 924 (requirements contracts of 5 or 10 years duration found "in and of themselves" to constitute unreasonable restraint).

As Justice Clark noted, "The vices of these contracts need not be belabored". 119a. The existing and potential restraint upon competitors and competition is obvious. But the courts below also have found impact upon those who would benefit from competition—the teams or facility owners granting franchises. As both trial judges found, the teams do not want the long terms and are adversely affected thereby. They lose control over quality of the concession services rendered, and they realize less income because of the low rates which accompany long term contracts. 120a. Given the manner in which Sportservice operates, it is usually a successor in interest, such as Finley, who must pay the price for market foreclosure. As the record shows, this is not by accident.

Follow-the-franchise provisions. As has been seen (p. 4, n. 8, *supra*), these provisions have the effect of making two contracts out of one when a team moves.[13] They also have been employed to enable Sportservice to skirt the competitive bidding requirements of public bodies and to gain access to various facilities through private negotiations with parties other than those owning the facilities.[14] In all cases, Sportservice has used

[13] The Athletics moved to Kansas City in 1955. In 1954, when the St. Louis Browns moved to Baltimore, a follow-the-franchise, provision enabled Sportservice to hold the St. Louis stadium, where the National League Cardinals stayed on, while at the same time capturing the stadium in Baltimore without competition. Within a year, 2 contracts had placed Sportservice in control of 4 major league stadia—not only for baseball, but for professional football and all other events conducted at the stadia. See 55a n. 11. Later, it was a follow-the-franchise provision which enabled Sportservice to tie down Milwaukee County Stadium without competition, ousting the incumbent concessionaire in the process. 115a.

[14] For example, when expansion baseball teams were awarded to Seattle and Montreal, neither city had a suitable stadium, but both planned to build new ones. In both cases, the team was to play in small below-standard stadia on a temporary basis. The governmental bodies who would be constructing the new stadia made it known that

(Footnote continued on following page.)

its follow-the-franchise provisions to extend its grip on the market without the need for competition, and to capture the business of those who were not parties to contracts with it.

Financial inducements. Many examples are reviewed in Justice Clark's opinion, and there are many more. Sportservice never had a salesman other than the keeper of its pursestrings; it caused it to be generally known that large sums of money were available in exchange for long term contracts. This lure brought in those who could not obtain financing elsewhere and who were willing to let someone else worry about the future. Often, the inducement took the form of providing financing for the purchase of a team or a facility.[15] Such loans have ranged up to millions of dollars and have constituted barriers to competition which have excluded firms not possessing the assets resources of Sportservice. They were the means through which long term contracts have been imposed throughout the marketplace.

Sportservice claims that the front-end cash and loans are but a part of the price paid for a franchise—a so-called "prepayment" or "overpayment" (Petn. 17, 19). But, as

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(Footnote continued from preceding page.)

competitive bidding would be required for any concession contract. Sportservice solved the problem by entering private arrangements with the two teams which prevented the teams from moving to the new stadia unless Sportservice came along. In both cases, the temporary stadia were burdened with 25 year contracts, even though it was known that they would be used for only a short time. See 114a-115a.

In a similar vein, Sportservice introduced evidence to show that, when the Athletics Contract was executed in 1950, it was contemplated that the team would move to another city.

[15] The payment and loan which induced the Athletics Contract were made to relieve a cash shortage created when one of Connie Mack's sons was purchasing the ownership interest of his half-brother.

Justice Clark observed (121a), this is not true "where the benefit accrues to someone other than the team", as was the case where Sportservice made loans or payments to individuals in their personal capacities on condition that they cause teams to execute concession contracts.[16] Even if regarded as a part of price, these inducements are not "overpayments,"[17] and they hardly amount to "competition on the merits" (Petn. 6, 10, 17). Rather, they are predatory practices which evince specific intent. Just as a sale below cost by a seller may be regarded as something other than "vigorous price competition" (Petn. 10 n. 16), it is equally predatory for a buyer to loan to a seller at 3½% monies which that buyer has borrowed at 9%, particularly where the relevant competition is among buyers. Practices such as those carried out by Sportservice have been condemned by the courts[18] and properly were taken into account by the courts below.

Intent. This case presents the rare spectacle of a firm seeking a writ of certiorari in the face of findings of specific intent to restrain and to monopolize which have gone unchal-

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[16] For example, personal loans to Bill Veeck enabled him to acquire a minority, but controlling, interest in each of three different baseball teams. In consideration for his personal loans and as he had promised he would do, Veeck caused the teams to give Sportservice long term contracts before he sold out and moved on to another team. The Veeck transactions enabled Sportservice to tie down major league stadia in Cleveland, St. Louis and Chicago. See 110a, 112a, 116a.

[17] This case demonstrates that the value of front-end inducements dispensed by Sportservice is less than the damage inflicted upon a team in just a year or two by virtue of the low rates payable under a Sportservice contract. Contrary to repeated statements in the petition (pp. 3 n. 2, 5, 9, 16, 18), Finley never has contended that Sportservice "paid too much" for its contracts. The reverse is true.

[18] *United States* v. *National City Lines*, 186 F. 2d 562 (7th Cir. 1951), *cert. denied*, 341 U. S. 916 (purchase of stock for more than market price to obtain exclusive contracts); *Hastings* v. *Federal Trade Commission*, 135 F. 2d 253, 258 (6th Cir. 1946), *cert denied*, 328 U. S. 853 (loans to capture exclusive accounts); *United States* v. *American Can Company*, 87 F. Supp. 18, 28 (N. D. Cal. 1949) (cash payments to induce exclusive contracts).

lenged. Although given little deference by Sportservice, the significance of intent has been established and recognized by this Court since the first statement of the rule of reason.[19]

The findings of specific intent to restrain made by Justice Clark and Judge Peckham did not result from any presumption. Those findings, concurred in by the Court of Appeals, were based on careful evaluation of testimony and documentation relating to countless Sportservice transactions. The many transactions portrayed by the record here involve different forms of conduct and different methods of restraint, but they are united by a common thread: a consistent and continuing purpose to remove as many concession franchises as possible from exposure to competition for as long as possible. The lower courts' findings of specific intent would suffice to support the judgment below.[20] Here, of course, the courts below found *both* unlawful purpose *and* anticompetitive effects.

Summary. The finding of unreasonable restraint of trade in this case is bottomed on much more than "a merely mechanical analysis" (Petn. 6). Instead, the courts below have given consideration to all factors appropriate to a rule of reason inquiry and, in the face of anticompetitive purpose and effect, have found unreasonable restraint. There is no reason for further review.

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[19] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 58; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

[20] *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522, 525, 527 ("even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act" p. 525); *Times-Picayune Publishing Company* v. *United States*, 345 U. S. 594, 614, 622-23 ("the contracts may yet be banned by § 1 if unreasonable restraint was either their object or effect" p. 614); *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436 n. 13 ("a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect").

II.

THE FINDING OF ATTEMPT TO MONOPOLIZE WAS FULLY JUSTIFIED AND NO FURTHER REVIEW IS WARRANTED

Unless the finding of unreasonable restraint under Section 1 of the Sherman Act were to be set aside, no review of the attempt violation under Section 2 could have any practical effect on the ultimate result as between the parties. The Section 2 violation added nothing to Finley's damages, which would have been the same if only Section 1 had been violated.

The court below stated the elements of an attempt to monopolize violation[21] in a manner which draws no criticism from Sportservice (compare Petn. 12). In challenging the statement of the Court of Appeals that an attempt may be shown by "conduct alone" in certain cases (26a), the petition focuses solely on the "dangerous probability" element.[22] Contrary to the suggestion of Sportservice (Petn. 4), the opinion below made it clear that the Ninth Circuit, like other circuits, has not "eliminated" the need for showing dangerous probability. There is no conflict among the circuits as to the elements of an attempt.

The attack here actually is directed not to the requisite elements of an attempt, but rather to the nature of proof required to establish dangerous probability. Sportservice contends that "only the Ninth Circuit" holds that neither proof of a

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[21] "A Section 2 attempt to monopolize claim requires proof of three elements: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success." 26a.

[22] Obviously, "conduct alone" can satisfy the "conduct" element stated by the Court of Appeals; and Sportservice does not deny that the "specific intent" element can be proven through conduct.

relevant market nor proof of the defendant's share of that market is required to show dangerous probability (Petn. 14). But, if that be the claimed shortcoming of the Ninth Circuit at which the petition is aimed, this case simply does not provide a proper vehicle for review. For, here, there has been proof of a relevant market and of Sportservice's share thereof. Despite the *language* of the court below regarding "conduct alone" (see 26a), the attempt violation was found and affirmed by the courts below only after elaborate inquiry established that Sportservice has total control over 24% of a judicially defined national market.

It is obvious that this is not the case in which to review statements made by the Ninth Circuit in other cases. Furthermore, the language from some of the earlier Ninth Circuit decisions cited by Sportservice (Petn. 14) already has been subsumed in later cases originating from that circuit. The Ninth Circuit continues to modify, refine and restate its verbalization of the attempt offense, as can be seen from its compendious opinion in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F. 2d 1014, 1027-1031 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3254 (U. S. Oct. 4, 1982) (No. 81-2083). This is part of the "ripening" process which confirms the wisdom of this Court's abstention to date. This Court repeatedly has declined to grant certiorari in attempt cases originating from all circuits—most recently and most notably in the *Inglis* case, wherein the petitioner launched an all-out attack against a recent articulation of the attempt offense fashioned by the Ninth Circuit. The time is not ripe to interrupt the ongoing evolutionary process within that circuit and others.

Sportservice makes little to no effort to demonstrate why the attempt violation found here is worthy of review. Both trial judges found a specific intent to monopolize. Those findings were based on hard evidence relating to scores of transactions over a period of many years; no "presumption" was needed or employed to arrive at the critical intent findings; and those

findings were not even challenged on appeal. The record shows Sportservice to be the world's largest concessionaire, dominant in its field, with demonstrated financial ability to do whatever it wants. It has exhibited an intent to destroy competition for concession contracts, has employed anticompetitive conduct toward that end, and, as a consequence of that conduct, already has sewn up 24% of a national market, comprised of individual monopolies, for years to come.[23] Where such a start has been made by a firm with both specific intent to monopolize and the wherewithal to effectuate that intent, the threshold of an attempt violation has been crossed. Compare, e. g., *Kearney & Trecker Corporation* v. *Giddings & Lewis, Inc.*, 452 F. 2d 579, 598-599 (7th Cir. 1971), *cert. denied*, 405 U. S. 1066, with *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F. 2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U. S. 921.

The market share of Sportservice is greater than the 22% that was found sufficient to support an attempt claim in *Inglis* and, given the unique characteristics of the market here, understates its true market power. Giving due consideration to all of the facts and circumstances of record, it certainly could not be said that the Sportservice share is so trivial as to afford it immunity as a matter of law. No court from any circuit has purported to establish any given market share as a haven of *per se* legality, and review should not be granted for any such purpose.[24] Moreover, if there were any magic in percentages,

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[23] There simply is no basis for the repeated claim that the market share of Sportservice "was declining" (Petn. 4 n. 4, 11) or "has declined" (Petn. 11 n. 18). No court below has so found; the record references cited do not support the claim; and it is untrue.

[24] The hornbooks might prefer a talismanic test under which X% of a market would be required to "monopolize" and Y% would be required for an attempt. But the attempt offense is designed to reach more than second class monopolies. Such a test would provide a safe harbor for the violator. It would strip the attempt offense of any

(Footnote continued on following page.)

the attempt violation here could not be overturned without considering the 50% market share determined by Justice Clark on the basis of a submarket which should not have been rejected as a relevant market in the first place.[25]

Finally, any review of the attempt to monopolize violation also would necessitate consideration of the offense of conspiracy to monopolize under Section 2. Justice Clark found the latter violation to be present, and that finding never has been overturned. Even if the degree of success already attained were to serve as the measure of attempt liability, there is no basis for engrafting a similar test upon the conspiracy offense.

(Footnote continued from preceding page.)

independent significance and would leave a hollow in antitrust enforcement within which blatant and damaging anticompetitive conduct would be immunized so long as it was perpetrated by a single firm whose market share fell below the requisite percentage. The Ninth Circuit has evidenced a sensitivity to these problems, to the history of the Sherman Act, and to the pronouncements of this Court. See, e.g., *Greyhound Computer Corporation* v. *International Business Machines Corporation*, 559 F. 2d 488, 504-505 (9th Cir. 1977), *cert. denied*, 434 U. S. 1040, and the authorities there cited.

[25] Contrary to the claim of Sportservice (Petn. 3 n. 3), Justice Clark did *not* focus on the market for "sale of concession items to the public". See 123a. He recognized that the relevant competition was that among concessionaires seeking to obtain concession contracts. It mattered not who was buyer or seller under these contracts, since the competition to obtain them remained the same, and since Justice Clark examined the market from the standpoint of both buyer and seller in any event. 107a-108a. The reversal of Justice Clark's market findings followed from the refusal of the first panel of the Court of Appeals to recognize that competition for major league baseball concession contracts could constitute a relevant submarket. Characterizing Justice Clark's finding of a relevant market as a "conclusion of law", the first panel summarily dismissed all of this Court's submarket cases as "inapposite". See 87a. Among the authorities so shunted aside was Justice Clark's own opinion in *International Boxing Club* v. *United States*, 358 U. S. 242, which so clearly supports his finding of a relevant submarket in this case.

III.

THE DAMAGE AWARD HERE, UNCHALLENGED IN THE COURT BELOW, SIMPLY PROVIDES COMPENSATION FOR ANTITRUST INJURY WHICH WAS SUSTAINED IN FACT

A writ of certiorari should not be granted to consider the injury and damage issues raised by the petition but not presented below. Before Judge Peckham, Sportservice offered no arguments whatever concerning Finley's damages. In the Court of Appeals, its only comments came in its answering brief on the cross-appeal—wherein Sportservice acknowledged its default in the trial court by stating that Judge Peckham had "in effect by stipulation carried forward the figures of Justice Clark" (p. 31)—and wherein Sportservice ridiculed Finley's request for an inflation adjustment to "a judgment concededly accurate if in fact there was any liability at all" (p. 32, n. 14).

Even if the present injury and damage arguments remained available to Sportservice, they are not worthy of review. Finley's damage award was proper under existing standards which have evolved from frequent and recent decisions of this Court and which require no further amplification.

Whether Sportservice was guilty of either or both of the violations found below, Finley's injury and damages are precisely the same. The injury was inflicted through enforcement of the Athletics Contract, which limited Finley to 29% of concession revenues. The record amply demonstrates that, wherever competition has been permitted, it has resulted in dramatically higher returns for comparable concession opportunities. See, e.g., 126a. Had Finley been able to partake of competition, each extra dollar which it would have received from concessions would have represented a dollar of profit. Finley sustained direct injury in fact.

Finley's injury was antitrust injury. Its business was "within that area of the economy which is endangered by a breakdown of competitive conditions".[28] It was an economic actor in the market restrained, but its participation in that market was precluded. Although Finley was not a competitor[27] of Sportservice, the injury it suffered was "inextricably intertwined" with the injuries sought to be inflicted on the market.[28] Indeed, its injury was inflicted directly by the violator as a means of effecting the violation and as a "necessary step" and "integral aspect" thereof.[29] The injury was clearly foreseeable as "the type of loss that the claimed violations . . . would be likely to cause";[30] it was "injury of the type the antitrust laws were intended to prevent".[31] In direct contrast to the plaintiffs in *Brunswick*, Finley seeks the profits it would have realized had competition been *permitted*.[32]

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[26] *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F. 2d 122, 129 (9th Cir. 1973).

[27] As the Court stated in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Company*, 334 U. S. 219 at 236: "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these."

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U. S. 134, relied upon by Sportservice (Petn. 17, 18), makes it clear that non-competitor parties to exclusive dealing contracts may recover for damages resulting from the restrictive portions of those contracts.

[28] *Blue Shield of Virginia* v. *McCready*, 73 L. Ed. 2d 149, 164.

[29] *Id.* at 161.

[30] *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S. 100, 125.

[31] *Brunswick Corporation* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489. The Sherman Act insists upon competition to enable those who deal with competing parties to benefit from competition among those parties; Finley obviously is within the class which would benefit from competition among concessionaires.

[32] In *Brunswick*, the plaintiff sought "the profits they would have realized had competition been *reduced*". 429 U. S. at 488, emphasis added.

As to measure of damages, Sportservice cites *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557, 566: "what plaintiff's situation would have been in the absence of defendant's antitrust violation" (Petn. 16). That is precisely the standard applied in 1972 by Justice Clark,[33] who fixed damages by comparing the concession payments received by Finley from Sportservice with the *minimum* payments available under a comparable contract awarded as the result of competition. Sportservice complains that the comparison was improper because it related to "different places" (Petn. 17). This contention is frivolous.[34]

The primary thrust of the petition is that certiorari should be granted to permit Sportservice to claim an "offset" which it never has requested before (Petn. 16-19). In developing this new theory, the petition suggests that Finley has "derived" (p. 18) and has been allowed to "keep" (p. 5) or "retain" (p. 19) the "prepayments" (p. 17) or "overpayments" (p. 19) made by Sportservice as inducements to procure the Athletics Contract in 1950—*i. e.*, a $150,000 cash payment and a

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[33] "Finley is entitled to recover its damages, the measure of which is the difference between what it would have received had there been no illegal restraints and what it actually received under the 1950 contract." 126a.

[34] There obviously could be no evidence of competitive offers for the Athletics concession business during the 4 year damage period (1964-1967) when Sportservice was entrenched at Kansas City Municipal Stadium. But, in the very next year (1968), another major league baseball team replaced the Athletics in Kansas City, and a 4 year concession contract was awarded for the very *same stadium* through competitive bidding. The prevailing concessionaire guaranteed a minimum payment of $236,000 per year for baseball concessions alone, amounting to $944,000 over a 4 year period. During the preceding 4 years, Finley had received only $661,832 under the Athletics Contract. The difference, amounting to $282,168, was the amount of damages incorporated in the judgment below. 126a.

$100,000 loan.[35] Sportservice contends that any such extra benefits received by an antitrust victim from an antitrust violator should be offset against the damages suffered at the hands of that violator. For purposes of this petition, that proposition may be assumed to be valid—and there is no need to await further decision in any other case.[36]

The plain fact is that Finley never received any cash payments, loans or other extra "benefits" from Sportservice.[37] There appears no reason why Finley's damages should be reduced by what Sportservice paid to someone else 32 years ago, particularly in view of the fact that, as an integral aspect of its unlawful conduct, Sportservice purposefully and repeatedly has entered into sweetheart arrangements with initial contracting parties in order to ensnare their successors for generations to come.

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[35] The offset argument ignores the fact that the 1968 Kansas City contract which formed the basis for damage comparison (see n. 34, *supra*) required an investment of $300,000 by the prevailing concessionaire in addition to the guarantees previously mentioned (Pl. Exh. 523).

[36] Sportservice apparently would have the Court defer ruling on its petition pending decision in *Weyerhaeuser Co.* v. *Lyman Lamb Co.* (No. 81-1618). See Petn. 17 n. 26. It may be assumed that this Court will decide that all elements of price must be considered in *Weyerhaeuser*. But such a holding would have no bearing on the issues properly before the Court on the present petition.

[37] The beneficiaries of the $150,000 cash payment and $100,000 loan were the members of the family of Connie Mack. Finley received nothing more from Sportservice than 29% of concession revenues generated from home games during its ownership of the Athletics. Finley never received any part of the $150,000 payment (which had been fully amortized before this litigation was filed) and never received or had the benefit of any Sportservice loan in any amount at any time. See 54a.

Even if the above considerations be ignored, any offset theory would require additional proof. Accordingly, Sportservice requests that the case be *remanded* for recalculation of damages (Petn. 17, n. 26). As both courts below have emphatically noted (see 3a), this case should come to an end! The request for a remand which would breathe new life into this long pending suit should not be entertained in order to indulge a rank afterthought.

CONCLUSION

The decision below would close out 15 years of litigation with a fair and just result fully supported by identical findings made by two respected trial judges and unanimously affirmed. The import of the decision is limited to the immediate parties and to the facts of the case. The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX K

EXCERPT FROM DISTRICT COURT MEMORANDUM AND ORDER, JULY 20, 1979

IN THE UNITED STATES DISTRICT COURT

For the Northern District of California

TWIN CITY SPORTSERVICE, INC., a Missouri corporation,
Plaintiff,

v.

CHARLES O. FINLEY & COMPANY, INC., an Illinois corporation,
Defendant.

Civ. No. 48234 RFP

CHARLES O. FINLEY & COMPANY, INC., an Illinois corporation,
Counterclaimant,

v.

TWIN CITY SPORTSERVICE, INC., a Missouri corporation; and SPORTSERVICE CORPORATION, a New York corporation,
Counterdefendants.

MEMORANDUM AND ORDER RE ATTORNEYS' FEES AND AMENDMENTS TO FINDINGS

[EXCERPT]

* * *

We also grant Finley's request that our 1978 memorandum be amended to include a correction and clarification of the concession franchises that we intended to include in the relevant market. The correction concerns specifically the amusement parks included in the relevant market. It was our intention to

exclude from the market those amusements parks having full kitchen operations, as well as those opened after 1970, and we relied on Defendant's Exhibit 1214 in counting 54 such facilities in the market. It now appears that the identifications of kitchen-equipped parks in that exhibit were incomplete and that 36 of those amusement parks did have kitchen operations, as indicated in Plaintiff's Exhibits 734, 739 and 805E. Thus only 18 amusement parks should have been included for a total of 118 franchises in the relevant market.

We also correct our market calculations to credit Sportservice with holding concession franchises at five of the 27 arenas with no major league sports, for a total of 23 franchises. Footnote 1 of that memorandum should accordingly be amended to include Kiel Auditorium in St. Louis, whose concession franchise as of 1970 had been the subject of consecutive Sportservice contracts of 3, 3, 3 and 5 years. Also in that footnote the citation to Plaintiff's Exhibit 606 should be changed to Plaintiff's Exhibit 609. The table appearing at page 4 of the 1978 memorandum should also be modified to reflect these corrections.

These corrections change the market share held by Sportservice from 19 percent to 24 percent. This of course provides even stronger support for our conclusion that Sportservice's restraints have foreclosed competition in a substantial portion of the relevant market.

Finley has asked us to clarify which concession franchises are included in our computations of the market by including in the 1978 memorandum specific references to lists of those facilities in the record and briefs. To this end, we direct the insertion of an asterisk and the following footnote after the word "Total" on line 4, page 4 of that memorandum:

> *The facilities to which these franchises relate are identified in Schedules I, II, III, IV and VII appended to Finley's post-trial brief. The amusement parks included are: La Brea Tar Pits, Los Angeles, Cal.; Funland, Reho-

both Beach, Del.; Marineland, St. Augustine, Fla.; Ringling Museums, Sarasota, Fla.; Lake Winnepesaukah, Rossville, Ga.; Ty Bee Amusement Park, Savannah Beach, Ga.; Adventure Land, Addison, Ill.; Funtown Amusement Park, Chicago, Ill.; Riverview Park, Des Moines, Iowa; Palace Playground, Old Orchard Beach, Me.; Jefferson National Expansion Memorial, St. Louis, Mo.; Meramac Caverns, Stanton, Mo.; Million Dollar Pier, Atlantic City, N.J.; Rockaway's Playland, Rockaway Beach, N.J.; West View Park, Pittsburgh, Pa.; Kennywood Amusement Park, West Mifflin, Pa.; Ruby Falls, Chattanooga, Tenn.; Fair Park, Nashville, Tenn. *See* Defendant's Exhibit 1214; Plaintiff's Exhibits 734, 739, 805E.

• • •

Dated: July 20, 1979

/s/ ROBERT F. PECKHAM
Chief United States District Judge

No. 82-396

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TWIN CITY SPORTSERVICE, INC., *et al.*,
Petitioners,

v.

CHARLES O. FINLEY & COMPANY, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. The brief in opposition highlights what it attempts to obscure: no court below ever applied the rule of reason; no court below ever looked at the actual effect of the challenged conduct on competition; and no court below ever examined whether Finley suffered antitrust injury, or to what degree. Instead, the courts below applied *Tampa Electric* mechanically rather than conceptually, starting from the unsupported premise that Sportservice's 24% market share made its contracts a "substantial foreclosure" of competition.[1]

[1] As the petitioners have consistently maintained, the 24% market share figure is itself totally artificial. Pet. at 4 n.4. The volume criteria which define this universe of concession opportunities ignore the demand consideration that facility owners within the universe can and do look to concessionaires

(footnote continues)

Notwithstanding respondents' effort to weave a complicated story of decades of intrigue and evil motives, the facts here are actually quite simple. In 1950, the owners of the Athletics had the rights to two businesses—the sale of baseball tickets and the sale of concession items. They needed money. They sold the concession business to gain the money to keep the franchise afloat.[2] As the initial district court noted, longer terms are almost invariably linked to loans or advances as consideration.[3] 365 F. Supp. at 251; App. E at 120a. There is no indication that any baseball owner under contract to Sportservice entered the original contract for any other reason than that Sportservice offered a more attractive package; nor is there any indication that Sportservice or other baseball concessionaires were able to preclude other concessionaires from bidding. Although respondents now are willing to second-guess the owners who preferred upfront money to increased percentage

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(*footnote continued*)

outside it for services and that concessionaires do not order their activities by those volume boundaries at all; larger concessionaires can and do do business with a broader range of facilities and concessionaires at smaller facilities can and do offer their services to larger facilities, as illustrated by Finley's experience in Oakland. Sportservice's market share in a broader, more rational market may be lower than two percent (PX801) and in any event would clearly be insignificant.

[2] The initial district court opinion was venomous on the subject of the "loans" and "payoffs" which paid for that business (and which kept the Athletics in business). 365 F. Supp. at 250; App. E at 118a. It cited as evidence for its suspicions of Sportservice's conduct the fact that other concessionaires would not offer the Athletics the cash the team needed in 1950 and that, without it, the Athletics might have folded entirely. 365 F. Supp. at 252-53; App. E at 121a-22a. In other words, the sale of the concession business resulted from a real need for the money, not from some manipulation by petitioners. Moreover, if the premise is true and the Athletics would have folded without that money, it is fatuous to maintain (as the respondents nevertheless do) that the payments have been fully amortized and that Finley retains no consequent benefit. Without those payments, *ceteris paribus*, there would have been no Athletics for Finley to buy.

[3] Similar arrangements are commonplace in connection with real estate and franchise transactions. Pet. at 8-9; *cf.* Richards, *National Accepts Shubert Pact: Gets Interest-Free $1 Million Loan In Return for 20-Year Contract*, Washington Post, Oct. 29, 1982, at B1, col. 6 (as consideration for 20-year lease, agreement to give interest-free $1 million loan repayable out of profits over 10 years, pay $100,00 per year, and split profits evenly).

revenues spread over a longer time, Br. in Opp. at 11-12, there was nothing irrational or anticompetitive in the preference at the time, nor does the passage of time change its character. Nor is there any way for Sportservice to turn these supposedly "predatory" payments at the beginning of the concession into extraordinary profits later.[4]

Later, the Athletics sold the baseball business; the new owner did not buy the concession business, which had already been sold, and the price paid for the baseball business inevitably reflected this earlier sale. Respondents now argue that Finley was "ensnared" by these "deceptive" prior sales contracts. But importantly, there is no suggestion that Finley got less than it paid for, nor is there any suggestion that the original sale to Finley was procured by fraud.[5] In any event, even if Finley could legitimately make such an argument, it would

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[4] All of the cases upon which respondents rely focus on the anticompetitive effect of enforced exclusivity; but here exclusivity in itself is not an issue, since both parties concede that the concession contract is necessarily exclusive. *Compare* the cases cited in the Brief in Opposition at fns. 12 and 18. The issue thus is not the competitive difference between exclusive and non-exclusive concession contracts, but the anticompetitive effect (if any) of an extended contract which must always be exclusive no matter who holds it. By ignoring the difference between concession contracts where length and not exclusivity is the issue, the opinion below obscured a central issue: is there any way in which the length of Sportservice's contract gives it the power to raise price or restrict output in future transactions? In the normal exclusive dealing situation, there is some conceivable danger that exclusive contracts can raise the costs of distribution or supply for competitors so that some power over price or ability to exclude competitors is achieved. Here there is no such possibility. At each facility, the existing concessionaire faces the same short-term demand whether the franchise is for two years or twenty. The bidding for the next available concession should reflect the money the concessionaire might realize from those rights, and a bidder certainly derives no advantage related to the length of concessions it might hold elsewhere.

[5] The respondents' attempt to portray Finley as a party caught between the Athletics contract with Sportservice and the Oakland Coliseum's contract with Sportservice's successor, Br. in Opp. at 3, is disingenuous and misleading. Charles Finley was the one who gave instructions to break the Sportservice contract (PX 136); Finley also protected itself in its arrangements with Sportservice's successor by providing that the successor would give up its rights if Finley were found to be bound to Sportservice. (Tr. 483-84).

certainly provide no grounds for relief against Sportservice, which was not a party to the Finley purchase. Finley is in the same position as one who buys a building which is already under long term lease: he is bound whether the deal was made in a buyers' or a sellers' market. The Athletics' owners who sold concession franchises to Sportservice were free to take or leave Sportservice's offer. If Finley wanted to recover the concession rights previously sold, he could have offered to buy them back or he could have refused to buy the baseball business without them. Instead, he accepted the contract, and later chose breach and litigation in an effort to be relieved of its obligations.

Finally, it cannot be rationally argued that this franchise has any impact at all on competition for other franchises. When other owners of concession rights make future offers to sell their concession businesses, Sportservice and other concessionaires are equally free to bid. There is no suggestion that there will be fewer bidders or less attractive terms as a result of Sportservice's other holdings. In bidding for other franchises, neither length, nor number of concessions, nor follow-the-franchise clauses, can affect Sportservice as a competitor or the seller's ability to decide on the most attractive offer on the merits. The effect on current or prospective competition which this Court has identified as the central concern of the antitrust laws, *see Brown Shoe Co. v. United States*, 370 U.S. 294, 320; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, is totally absent.

2. If, as this analysis indicates, Sportservice's conduct was not a restraint of trade, then the attempt to monopolize claim must fail as well. The respondents distort the reasoning of the court of appeals when they argue that the finding of intent to monopolize can stand on its own. The court of appeals' inferences of specific intent to monopolize and dangerous probability of success were based upon the same "anticompetitive" characterizations of Sportservice's conduct which supported the findings under Section 1; if that conduct was not "the basis for a substantial claim of restraint of trade," there is no basis for those inferences and no basis for the attempted

monopolization claim. 676 F.2d at 1308-09; App. A at 26a-27a.[6]

3. Finley does not dispute that Sportservice in fact paid substantial sums (in the form of loans and advances, in addition to a percentage of sales) for the Athletics' concession franchise. Instead, Finley argues that Sportservice never paid *Finley*, and thus those payments are irrelevant to a calculation of *Finley's* damages. But Finley never owned the Athletics' concession rights; it bought the Athletics subject to Sportservice's existing contract, and its payment for the Athletics inevitably reflected that fact. When Finley moved the Athletics to Oakland (presumably for economic reasons), it no doubt occurred to Finley that it could make more money by breaking the existing contract and selling the concession rights that it had never paid for. The result is this litigation.

What the courts below have done is to ratify Finley's economic reasoning: if you can sell rights you didn't have to pay for, you will undoubtedly make more money than you could by not selling those rights. Petitioner does not doubt Finley's arithmetic, but surely this cannot be the kind of "injury" the antitrust laws were designed to remedy[7], *see Brunswick*, 429

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[6] It is somewhat surprising that the respondents are able to discern a harmonious evolution of attempt to monopolize standards in the decisions of the Ninth and those of other circuits. The overwhelming perception of disinterested commentators and enterprising plaintiffs seems to be to the contrary. *See* Pet. at 11 n.19; III P. Areeda & D. Turner, *Antitrust Law* ¶ 832 (1978); J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2] nn. 30-33 (1982); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373, 385, 419-20 (1974). Respondents stress the point that market factors and shares are not irrelevant in the Ninth Circuit, but they cannot gloss over the fact that the Ninth Circuit permits intent and dangerous probability of success to be inferred from conduct alone, and that the showing below would not support an attempt finding elsewhere.

[7] Respondents' assertion that injury and damage issues were not raised below is simply not accurate. In fact, this point has been argued strenuously since the initial district court opinion. *See, e.g.*, Post-Trial Memorandum of Plaintiff Twin City Sportservice, Inc., and Counterdefendants Twin City Sportservice, Inc., and Sportservice Corporation, and Memorandum in Sup-

(*footnote continues*)

U.S. at 489. The result below can only be justified by ignoring the actual benefits received by Finley's predecessors in interest and equating the economic interests of one party to a bargain with the public interest in competition. Neither premise is acceptable under the decisions of this Court.

(footnote continued)

port of Plaintiff's and Counterdefendants' Proposed Findings of Fact and Conclusions of Law at iii, 3, 73-74, 78-81; Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of the Plaintiff and Counterdefendants Twin City Sportservice, Inc. and Sportservice Corporation at 18-21, both in the district court below (1972).

CONCLUSION

For all the reasons discussed here and in the initial petition, petition for certiorari should be granted.

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